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SJ 7--Examination of Requiring Criminal Background Checks for Direct-Care Workers

WORKGROUP MEMBERS AND AFFILIATIONS

<u>Member</u>	<u>Affiliation</u>
Betty Beverly	Montana Senior Citizens Association
Casey Blumenthal, RN	Montana Hospital Association
Grace Bowman	Senior Citizens Advocate
Gayla Brown, RN	Elkhorn Health and Rehabilitation
Webb Brown	Montana Chamber of Commerce
Kim Daugett	Living Life
Tom Gregg	St. Peter's Hospital
George Groesbeck	AWARE
Mike Hanshew	Montana Health Solutions
Rose Hughes	Montana Health Care Association
Stu Lekander	Easter Seals, Goodwill Northern Rocky Mountain Region
Shirley Powell	Senior Citizens' Advocate and Consumer
Karolyne Redding, PHR	Waterford on Saddle Drive
Bob Ross	South Central Mental Health Center
Al Ward	AARP, Montana

SJ 7--Examination of Requiring Criminal Background Checks for Direct-Care Workers

Definition of Direct-Care Staff and Programs and Services

This document serves as a summary of the definition of direct-care staff and programs and services in regard to the work performed by Department of Public Health and Human Services (DPHHS) (Department), Department of Justice (DOJ), and interested members of the public on Senate Joint Resolution 7 (SJ 7). Specifically regarding provisions (1) and (2) of the resolution to: "identify the programs and services for which criminal background checks should be required;" and "specify the direct-care staff positions for which criminal background checks should be required."

From the start, the workgroup determined that criminal background checks are one critical aspect in protecting the health and safety of Montana's most vulnerable populations. Because a study of this magnitude is so complex and involves so many different types of health care workers and health care facilities, the group believed one of its primary charges was to define "direct-care worker." The group carefully considered the potential impact that criminal background check requirements would have on facilities, workers, and beneficiaries. Striving to meet the charge of the Legislature, considering the needs of employers and regulators, and seeking the best path to promote public safety, the group offers the following definitions.

Definitions

The definition for the "direct-care worker" was changed to "direct-care access employee" for the purposes of this project so that the employees covered under this requirement would not be confused with the employees covered under the reimbursement and funding provisions of DPHHS related to increased wages for direct-care workers.

"Direct-care access employee" means a person, 18 years of age and older, who has employment or contractual relationship with a service setting that is funded or regulated by the Department and involves direct contact with a vulnerable person. Such term does not include an individual that is employed or providing services through a private arrangement with a vulnerable person or their designated representative.

"Vulnerable person" means a person who receives services as defined in this "Act" and who needs to be protected from abuse, neglect, or exploitation.

"Direct contact" means physical access to persons receiving services or that person's personal property.

"Service setting" for the purposes of this "Act" means those programs or services that the legislature has determined to represent the greatest risk to the health, safety, and welfare of vulnerable persons served by the Department. Such definition include, as these services are defined in statute and administrative rule:

- Youth Care Facilities
- Community home for persons with severe disabilities - Group Homes for Developmentally Disabled or Physically Disabled
- Adult Day Care
- Adult Foster Care
- Assisted Living Facilities
- Critical Access Hospitals
- Home Health Agencies
- Hospice
- Hospitals (Including inpatient psychiatric services) Montana State Hospital
- Inpatient Chemical Dependency Centers
- Intermediate Care Facility for the Developmentally Disabled
- Mental Health Centers
- Nursing Facility (Nursing Homes), (LTC), (Veteran's Homes), (Montana Developmental Center), (Montana Mental Health Nursing Care Center), (Transitional Care Unit)
- Residential Treatment Center (RTC)
- Home and Community Based Services (HCBS)¹ *as identified by administrative rule*
- Personal Care Services

Home and Community Based Services (HCBS) under the Service Settings

Under the service setting definition each HCBS program is required to identify the HCBS services provided by the Department and specifically identify those services that require criminal background checks for direct-care access employees. *Due to the broad nature of the HCBS services and the fact that some services are provided by contractors for home or vehicle modifications, not all of the HCBS services would necessarily require criminal background checks. HCBS services requiring fingerprint background checks would be further defined by administrative rule.*

Self-direct model services

Self-direct model services are included in the service settings. *In circumstances where services are provided under the self-direct model, criminal background checks are required. The provision of services under the self-direct model, where the person receiving services or a personal representative acts as the employer of the direct-care access employee in making the decisions of who to employ, terms of employment, length of employment, and other matters, are included in the background check criteria.*

¹ Section 1915 of Title XIX of the Social Security Act, 42 U.S.C. 1396n, provides authority for States to administer programs of home and community-based services funded with Medicaid money for categories of persons with disabilities or persons who are elderly.

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Process and Timeline – Fingerprint Background Checks

This document serves as a summary of the process and timeline regarding a fingerprint based background check in regard to the work performed by Department of Public Health and Human Services (DPHHS) (Department), Department of Justice (DOJ), and interested members of the public on Senate Joint Resolution 7 (SJ 7). Specifically regarding provision (3) of the resolution to: "provide a detailed process and timeline for collecting an applicant's fingerprints, submitting them to the Federal Bureau of Investigation, and distributing appropriate information to employers."

The workgroup discussed process and information for employers on numerous occasions as all were concerned regarding the timeliness of the process, how fingerprints were obtained, and what kind of information could be provided to the employer.

Staff from DOJ was present at all workgroup meetings and provided a presentation on various types of background checks which included cost, accessibility, and timelines. The workgroup reviewed all types of background checks because cost, reliability, and thoroughness are all factors driving this proposal. This proposal focuses on the directive of SJ 7 to prepare a study report utilizing fingerprints. The resolution identified a fingerprint process through the Federal Bureau of Investigation, but the study results identified another alternative resource that is equally effective. That resource is a fingerprint check process through the Western Identification Network (WIN).

A name based background check can be completed for as little as \$10 or \$11.50 if checked via the Internet; this check can be completed within a few days if conducted by DOJ or the information can be provided immediately if checked via the Internet. Name based searches look for criminal history records that match a person's name and numeric identifier, such as date of birth and/or Social Security number. Name-based searches have two inherent weaknesses:

- False-positives - a record is returned on a person with the same name and numeric identifier provided in the request but who is not the subject of the inquiry.
- False-negatives - no match is erroneously returned because the name or numeric identifier in the record does not match the name or numeric identifier used in the inquiry.

Therefore, a name based check can be limited by the information supplied by the applicant. If the applicant provides incorrect information or does not divulge aliases or other pertinent information, it may limit the accuracy of this type of check.

An eight state Western Identification Network (WIN) background check based on fingerprints can be completed for \$10 plus the cost of obtaining fingerprints; this check can usually be completed within 7 to 10 days. WIN is a consortium of state and local law enforcement agencies that have implemented a shared network and Automated Fingerprint Identification System (AFIS) processing service to provide the ability to search the criminal fingerprint records of the member agencies. WIN member agencies include Alaska, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming. A WIN check is limited to the states within the agreement. If an applicant committed a crime in another state, the information would not be available on this report. Therefore, if an applicant demonstrates residency within one of these states the fingerprint check can be limited to the WIN states. If the applicant has lived in states other than those in WIN, an FBI fingerprint background check will be required.

A national FBI background check can be completed for \$29.25 plus the cost of obtaining the fingerprints. The cost of obtaining fingerprints can vary from \$5.00 to \$40.00 depending on where the fingerprints are taken. This check is the most thorough as fingerprint based checks provide a positive biometric identification of the person regardless of the name or numerical identifiers utilized.

For the purposes of this study and the cost analysis under provision (6), we used an estimated cost of \$20.75 for obtaining fingerprints, resulting in an estimated cost of \$50.00 for an FBI check and \$30.75 for a WIN check.

The fingerprint background check processing time usually takes 7 to 10 working days and consists of:

- Rolled fingerprint cards are submitted by qualified entity to DOJ.
- DOJ conducts quality control analysis to verify all demographic information is included and fingerprint impressions quality is acceptable.
- If rejected, cards are mailed back to qualified entity with rejection explanation. A new set of prints may be submitted with rejection explanation at no additional charge.
- DOJ processes card through WIN and FBI as applicable.
- Results are printed and attached to fingerprint card for return to qualified entity. Results consist of notification of one of the following:
 - no criminal history;
 - copy of complete criminal history record (rap sheet)¹;
 - fingerprints were rejected due to poor quality. New prints may be submitted at no additional charge. If FBI rejects prints twice, the FBI may run a name based national check at no additional charge.

¹ Per DOJ correspondence: With regard to dissemination of "full" or "complete" criminal records (rap sheets), there is some confidential criminal justice information regarding deferred/dismissed dispositions that may not be released in accordance with 46-18-204, MCA. In accordance with 46-18-204, MCA, this information is confidential criminal justice information and may not be released for noncriminal justice purposes (including SJ 7) without a district court order. While a disposition of "deferred" may be released, a disposition of "deferred/dismissed" may not.

The results of a fingerprint background check are considered a confidential record. This record is available only to criminal justice agencies, to those authorized by law to receive it, by court order, and to the individual of record. Confidential criminal history information includes all physical identifiers and dismissals after a deferred imposition of sentence.

Results of a fingerprint based background check completed under the authority of Public Law 92-544 (see note below) will include the individual's full criminal history record (rap sheet). Results may be shared with other qualified entities if a user agreement is in place and a consent form has been obtained (see attached FBI letter dated November 2, 2006, in Attachment I).

(*Note) Public Law (PL) 92-544 Requirements

The authority for the FBI to conduct a criminal record check for a noncriminal justice licensing or employment purpose is based upon PL 92-544. Pursuant to PL 92-544, the FBI is empowered to exchange identification records with officials or state and local governments for purposes of licensing and employment if authorized by a state statute which has been approved by the Attorney General of the United States. The Attorney General's authority to approve the statute is delegated to the FBI which uses standards established by a series of memoranda issued by the Office of Legal Counsel, US DOJ. The standards are:

1. The authorization must exist as the result of legislative enactment (or its functional equivalent);
2. The authorization must require fingerprinting of the applicant;
3. The authorization must, expressly or by implication, authorize use of FBI records for screening of the applicant;
4. The authorization must not be against public policy;
5. The authorization must not be overly broad in its scope; it must identify the specific category of applicant/licensees.

Process and Timeline

Based upon the information provided to the workgroup the process and timeline for collecting an applicant's fingerprints, processing fingerprints, and distributing appropriate information to employers; will be that utilized by the DOJ as outlined above.

To ensure that the timelines of this process are not extended, the process must be handled directly by DOJ with little involvement by DPHHS. Communication regarding the requests for the check, processing, and return of the results needs to be directly between DOJ and the employer.

DPHHS and DOJ will jointly implement a training program / or identify alternative resources for obtaining fingerprints. As noted above, the cost of obtaining fingerprints can vary from

\$5.00 to \$40.00 depending on where the fingerprints are taken. Therefore, a consistent resource would need to be established to reduce the cost of this service.

The process would require communications between DOJ and DPHHS to notify DPHHS of all fingerprint based background checks conducted in accordance with this public policy, for purposes of maintaining the registry, program management, and appeals.

DPHHS would provide direct communication to the employer and applicant in cases where the criminal history report indicates a felony conviction that results in a disqualifying event. The communication would provide two methods of appeal. One appeal would relate to the accuracy of the record which would then be handled by DOJ utilizing existing processes, and the other appeal would be for the application of the disqualifying event.

It is proposed that DPHHS would develop and maintain a registry of individuals that have completed a fingerprint background check. This registry is planned to be a resource for employers to verify if a criminal background check was already completed on a prospective employee. The registry will provide secure access for employers to maintain the integrity and security of the database. An employer will be able to check this registry, and if an employee has had a criminal background check done, another fingerprint check will not be required. The registry will identify the date the background check was done and provide the employer with a certificate for their files to verify to regulators their compliance with this requirement. We believe the establishment of a registry is a key factor to keep the costs of the program under control. Without a registry, the providers in the identified services settings will be required to conduct significant numbers of fingerprint background checks at significant costs.

Consideration needs to be provided for establishing a timeframe for refingerprinting and processing of prints for persons listed on the registry. There is currently no set requirement for reprinting. The workgroup discussed timeframes of two or three years and thought five years was too long. This needs to be considered because the results of a criminal history check are essentially out of date as soon as they are disseminated, reprinting would identify new crimes committed since the time of the original fingerprinting. Another possibility other than refingerprinting is to implement policies that require periodic on-line verification of the information on the registry directly with the Criminal Justice Information Network (CJIN) and/or requiring an individual to submit to the fingerprinting process if they have been absent from the state or employment in the health care services settings for a specified period of time.

SJ 7--Examination of Requiring Criminal Background Checks for Direct-Care Workers

Relevant Crimes and Disqualifying Events

This document serves as a summary of the disqualifying events in regard to the work performed by Department of Public Health and Human Services (DPHHS) (Department), Department of Justice (DOJ), and interested members of the public on Senate Joint Resolution 7 (SJ 7). Specifically regarding provision (4) of the resolution to: "establish a specific list of relevant crimes that would exclude a convicted applicant from employment as a direct-care staff person."

The attached list represents the general consensus of the workgroup from the April 2008 meeting. During the February 2008 meeting, the Department presented a summary document identifying and defining the crimes which would constitute disqualifying events for Montana. This document was the result of the workgroup activities from the December 2007 meeting and a subcommittee which met in January 2008.

During the February 2008 workgroup meeting, several members voiced concern over the number of permanently identified disqualifying crimes and requested that the Department again review the information; and in doing so, specifically requested that the Department obtain assistance from the Department's legal staff, Department of Justice, and others who have knowledge in this area of criminology.

As requested, Department staff convened a second subcommittee which was comprised of representatives from Department of Justice, Adult Protective Services, and QAD staff members. Prior to the subcommittee meeting, DPHHS legal staff reviewed the list of crimes and identified the extent of penalty for those crimes—whether the crime could be charged as a felony or misdemeanor. Additionally, Department legal staff researched other statutes which might contain crimes pertinent to the work of the SJ 7 workgroup.

With this preparation, the second subcommittee began work and discussion on March 11, 2008. The subcommittee focused its attention in three distinct areas:

- (1) Crimes which could be considered Permanent Disqualifiers;
- (2) Crimes which could be 'aged out' with either a 5 or 10 year time frame; and
- (3) Identification of crimes which should not be considered.

Additionally, the subcommittee decided that in order to make this a tenable task, the focus should be limited to crimes which have been designated as **felonies**. Misdemeanor crimes would not be considered at this time. In Montana, a crime is

considered a felony if the sentence imposed upon conviction is imprisonment in a state prison for a term exceeding one year or if the sentence results in death.

The subcommittee; using only those crimes designated as felonies; made recommendations as to which crimes should be considered permanent disqualifiers as well as those crimes which should be considered 'aged out offenses' with time frames of disqualification existing for 5 or 10 year periods. The attached document shows those recommendations.

The subcommittee also considered the discussions from the workgroup surrounding the authority to enforce the identified disqualifiers; should they be listed in statute, or in administrative rule? Consistent with the discussions of the SJ 7 workgroup, the subcommittee concurred and further proposes that all crimes designated as permanent disqualifiers be listed in statute, while the crimes designated as 'aged out' should be set in administrative rule.

SJ 7 - Disqualifying Events
Criminal Background Checks
Updated: 4/4/2008

Prepared for the SJ 7 Workgroup Meeting April 2008
Recommendations of DPHHS and DOJ staff

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
Chap 5 -- Offenses Against a Person				
<u>PART 1 Homicide</u>				
45-5-102. Deliberate homicide	FELONY	X		
45-5-103. Mitigated deliberate homicide	FELONY	X		
45-5-104. Negligent homicide	FELONY		10 YRS	
45-5-105. Aiding or soliciting suicide	FELONY	X		
45-5-106. Vehicular homicide while under influence	FELONY		10 YRS	
<u>PART 2 Assault and related offenses</u>				
45-5-201. Assault	MISDEMEANOR			
45-5-202. Aggravated Assault	FELONY	X		
45-5-203. Intimidation	FELONY	X		
45-5-204. Mistreating prisoners	FELONY	X		
45-5-205. Negligent vehicular assault				
(w/o serious bodily injury)	MISDEMEANOR		5 YRS	
(causing serious bodily injury)	FELONY		10 YRS	
45-5-206. Partner or family member assault				

Attachment D
Relevant Crimes and Disqualifying Events
December 2008

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
(first offense)	MISDEMEANOR			
(second offense)	MISDEMEANOR			
(third or subsequent offense)	FELONY	X		
45-5-207. Criminal endangerment	FELONY		5 YRS	
45-5-208. Negligent endangerment	MISDEMEANOR			
45-5-209. Partner or family member assault -- no contact order	MISDEMEANOR			
45-5-210. Assault on peace officer or judicial officer				
(w/o serious bodily injury)	FELONY	X		
(causing serious bodily injury)	FELONY	X		
45-5-211. Assault upon sports official	MISDEMEANOR			
45-5-212. Assault on minor	FELONY	X		
45-5-213. Assault with weapon	FELONY	X		
45-5-214. Assault with bodily fluid	MISDEMEANOR			
45-5-220. Stalking				
(first offense)	MISDEMEANOR			
(second or subsequent offense)	FELONY	X		
45-5-221. Malicious intimidation or harassment relating to civil or human rights	FELONY	X		
45-5-223. Surreptitious visual observation or recording				
(place of residence first offense)	MISDEMEANOR			
(place of residence second offense)	MISDEMEANOR			
(place of residence third or subsequent offense)	FELONY	X		
(public establishment - adult)	MISDEMEANOR			
(public establishment - minor)	FELONY	X		
<u>PART 3 Kidnapping</u>				
45-5-301. Unlawful restraint	MISDEMEANOR			
45-5-302. Kidnapping	FELONY	X		
45-5-303. Aggravated kidnapping	FELONY	X		
45-5-304. Custodial interference	FELONY		5 YRS	

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
45-5-305. Subjecting another to involuntary servitude	FELONY	X		
(including aggravated kidnapping, sexual intercourse w/o consent or deliberate homicide)	FELONY	X		
45-5-306. Trafficking of persons for involuntary servitude	FELONY	X		
(including aggravated kidnapping, sexual intercourse w/o consent or deliberate homicide)	FELONY	X		
<u>PART 4 Robbery</u>				
45-5-401. Robbery	FELONY	X		
<u>PART 5 Sexual Crimes</u>				
45-5-502. Sexual Assault	MISDEMEANOR			
(victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury)	FELONY		10 YRS	
45-5-503. Sexual intercourse without consent	FELONY	X		
45-5-504. Indecent exposure				
(first offense)	MISDEMEANOR			
(second offense)	MISDEMEANOR			
(third or subsequent offense)	FELONY		5 YRS	
45-5-505. Deviate sexual conduct	unconstitutional law			
45-5-507. Incest				
(victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury)	FELONY	X		
* there are several different sentencing guidelines, but the minimum is 2 years and thus a felony				
<u>PART 6 Offenses Against the Family</u>				
45-5-601. Prostitution	MISDEMEANOR			
(prostitute client first offense)	MISDEMEANOR			
(prostitute client second or subsequent offense)	FELONY		5 YRS	

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
(prostitute under 12 and client over 18)	FELONY	X		
45-5-602. Promoting prostitution		X		
(prostitute under 12 and client over 18)	FELONY	X		
45-5-603. Aggravated promotion of prostitution		X		
(prostitute under 18)	FELONY	X		
(prostitute under 12 and client over 18)	FELONY	X		
45-5-611. Bigamy	MISDEMEANOR			
45-5-612. Marrying a bigamist	MISDEMEANOR			
45-5-621. Nonsupport	MISDEMEANOR			
(aggravated nonsupport)	FELONY		5 YRS	
45-5-622. Endangering welfare of children	MISDEMEANOR			
(3) Methamphetamine Endangerment)	FELONY		10 YRS	
45-5-623. Unlawful transactions with children	MISDEMEANOR			
45-5-624. Unlawful attempt to purchase or possession of intoxicating substance	MISDEMEANOR			
45-5-625. Sexual abuse of children	FELONY	X		
(victim under 16)	FELONY	X		
(possession of materials)	FELONY	X		
(victim under 12 and offender over 18)	FELONY	X		
45-5-626. Violation of order of protection		X		
(first and second offense)	MISDEMEANOR			
(third or subsequent offense)	FELONY		10 YRS	
45-5-627. Ritual abuse of minor				
(first offense)	FELONY	X		
(second or subsequent offense)	FELONY	X		
45-5-631. Interference with parent-child contact	MISDEMEANOR			
45-5-632. Aggravated interference with parent-child contact	MISDEMEANOR			
45-5-634. Parenting interference	FELONY		5 YRS	

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
45-5-637. Tobacco possession or consumption by persons under 18 years of age prohibited	MISDEMEANOR			
Chap 6 -- Offenses Against Property				
<u>PART 1 Criminal Mischief and Arson</u>				
45-6-101. Criminal mischief	MISDEMEANOR			
(injures or kills animal or causes a substantial interruption of public services)	FELONY		5 YRS	
45-6-102. Negligent Arson	MISDEMEANOR			
(places person in danger of serious bodily injury or death)	FELONY	X		
45-6-103. Arson	FELONY	X		
45-6-104. Desecration of capitol, place of worship, cemetery, or public memorial	MISDEMEANOR			
(greater than \$1,000 in damages)	FELONY		5 YRS	
45-6-105. Criminal destruction of or tampering with communication device	MISDEMEANOR			
<u>PART 2 Criminal trespass and burglary</u>				
45-6-202. Criminal trespass to vehicles	MISDEMEANOR			
45-6-203. Criminal trespass to property	MISDEMEANOR			
45-6-204. Burglary	FELONY	X		
(aggravated burglary)	FELONY	X		
45-6-205. Possession of burglary tools	MISDEMEANOR			
<u>PART 3 Theft and Related Offenses</u>				
45-6-301. Theft	MISDEMEANOR			
(exceeding \$1,000 or of animal or of ammonia for manufacturing drugs)	FELONY		5 YRS	
(exceeding \$10,000)	FELONY	X		
45-6-302. Theft of lost or mislaid property	MISDEMEANOR			
45-6-303. Offender's Interest in the property (NOT A CRIME)				

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
45-6-305. Theft of labor or services or use of property	MISDEMEANOR			
45-6-306. Obtaining communication services with intent to defraud (NOT A CRIME)				
45-6-307. Aiding the avoidance of telecommunications charges	MISDEMEANOR			
45-6-308. Unauthorized use of motor vehicles	MISDEMEANOR			
45-6-309. Failure to return rented or leased personal property	MISDEMEANOR			
(exceeding \$1,000)	FELONY		5 YRS	
45-6-311. Unlawful use of a computer	MISDEMEANOR			
(exceeding \$1,000)	FELONY			X
45-6-312. Unauthorized acquisition or transfer of food stamps	MISDEMEANOR			
(exceeding \$1,000)	FELONY			X
45-6-313. Medicaid fraud				
(first and second offense)	MISDEMEANOR			
(third or subsequent offense)	MISDEMEANOR			
(exceeding \$1,000)	FELONY	X		
45-6-314. Theft by disposal of stolen property	MISDEMEANOR			
45-6-315. Defrauding creditors	MISDEMEANOR			
45-6-316. Issuing a bad check	MISDEMEANOR			
(exceeding \$1,000 or part of common scheme)	FELONY		5 YRS	
45-6-317. Deceptive practices	MISDEMEANOR			
(exceeding \$1,000 or part of common scheme)	FELONY		5 YRS	
45-6-318. Deceptive business practices	MISDEMEANOR			
45-6-319. Chain distributor schemes	MISDEMEANOR			
(second offense)	FELONY		5 YRS	
45-6-325. Forgery	MISDEMEANOR			
(exceeding \$1,000 or part of common scheme)	FELONY	X		
46-6-326. Obscuring the identity of a machine	MISDEMEANOR			
46-6-327. Illegal branding or altering or obscuring a brand	FELONY			X

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
46-6-332. Theft of identity	MISDEMEANOR			
(exceeding \$1,000)	FELONY	X		
46-6-341. Money laundering	MISDEMEANOR			
(exceeding \$1,000 or part of common scheme)	FELONY			X
Chap 7 -- Offenses Against Public Administration				
<u>PART 1 Bribery and Corrupt Influence</u>				
45-7-101. Bribery in official and political matters	FELONY			X
45-7-102. Threats and other improper influence in official and political matters	FELONY			X
45-7-103. Compensation for past official behavior	MISDEMEANOR			
45-7-104. Gifts to public servants by persons subject to their jurisdiction	MISDEMEANOR			
<u>PART 2 Perjury and Other Falsification in Official Matters</u>				
45-7-201. Perjury	FELONY			X
45-7-202. False swearing	MISDEMEANOR			
45-7-203. Unsworn falsification to authorities	MISDEMEANOR			
45-7-204. False alarms to agencies of public safety	MISDEMEANOR			
45-7-205. False reports to law enforcement authorities	MISDEMEANOR			
45-7-206. Tampering with witnesses and informants	FELONY			X
45-7-207. Tampering with or fabricating physical evidence	FELONY			X
45-7-208. Tampering with public records or information	FELONY			X
45-7-209. Impersonation of public servant	FELONY			X
45-7-210. False claim to public agency	MISDEMEANOR			
(exceeding \$1,000 or part of common scheme)				
<u>PART 3 Obstructing Governmental Objectives</u>				
45-7-301. Resisting arrest	MISDEMEANOR			
45-7-302. Obstructing peace officer or other public servant	MISDEMEANOR			
45-7-303. Obstructing justice	MISDEMEANOR			
45-7-304. Failure to aid a peace officer	MISDEMEANOR			
45-7-305. Compounding a	MISDEMEANOR			

Attachment D
Relevant Crimes and Disqualifying Events
December 2008

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
felony				
45-7-306. Escape	MISDEMEANOR			
(after being charged w/ or convicted of felony)	FELONY			X
(use of threat of force or physical violence)	FELONY			X
45-7-307. Transferring illegal articles -- unauthorized communication	MISDEMEANOR			
(not weapon or drug; person not in prison)	MISDEMEANOR			
(not weapon or drug; person in prison)	MISDEMEANOR			
(drug; person in prison)	FELONY			X
(weapon; person in prison)	FELONY			X
45-7-308. Bail-jumping	MISDEMEANOR			
(in connection with felony)	FELONY			X
45-7-309. Criminal contempt	MISDEMEANOR			
<u>PART 4 Official Misconduct</u>				
45-7-401. Official Misconduct	MISDEMEANOR			
<u>PART 5 Employer Misconduct</u>				X
45-7-501. Employer Misconduct	FELONY			X
Chap 8 -- Offenses Against Public Order				
<u>PART 1 Conduct Disruptive of Public Order</u>				
45-8-101. Disorderly Conduct	MISDEMEANOR			
45-8-102. Failure of disorderly persons to disperse	MISDEMEANOR			
45-8-103. Riot	MISDEMEANOR			
(while incarcerated)	FELONY			X
45-8-104. Incitement to riot	MISDEMEANOR			
(while incarcerated)	FELONY			X
45-8-105. Criminal incitement	FELONY			X
45-8-106. Bringing armed men into the state	FELONY			X
45-8-109. Civil disorder -- prohibited activities	FELONY			X
45-8-110. Obstructing health care facility access	MISDEMEANOR			
45-8-111. Public nuisance	MISDEMEANOR			
45-8-112. Action to abate a public nuisance (NOT A CRIME)				
45-8-113. Creating a hazard	MISDEMEANOR			

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
45-8-114. Failure to yield party line	MISDEMEANOR			
45-8-115. Illegal posting of state and federal line	MISDEMEANOR			
45-8-116. Funeral picketing -- penalties	MISDEMEANOR			
<u>PART 2 Offensive, indecent and inhumane conduct</u>				
45-8-201. Obscenity	MISDEMEANOR			
45-8-208. Penalties for 45-8-206. Public display or dissemination of obscene material to minors	MISDEMEANOR			
45-8-209. Harming a police dog -- penalty	MISDEMEANOR			
45-8-210. Causing animals to fight -- owners, trainers, and spectators	FELONY			X
45-8-211. Cruelty to animals - exceptions	MISDEMEANOR			
(second or subsequent offense or aggravated)	FELONY		10 YRS	
45-8-212. Criminal defamation	MISDEMEANOR			
45-8-213. Privacy in communications	MISDEMEANOR			
(second offense)	MISDEMEANOR			
(third or subsequent offense)	FELONY			X
45-8-214. Bribery in contests	FELONY			X
45-8-215. Desecration of flags	FELONY			X
45-8-216. Unlawful automated telephone solicitation	MISDEMEANOR			
45-8-217. Aggravated animal cruelty	FELONY		10 YRS	
45-8-220. Criminal invasion of personal privacy	MISDEMEANOR			
<u>PART 3 Weapons</u>				
45-8-303. Possession or use of machine gun in connection with a crime	FELONY			X
45-8-304. Possession or use of a machine gun for offensive purpose	FELONY			X
45-8-305. Presumption of offensive or aggressive purpose (NOT A CRIME)				

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
45-8-313. Unlawful possession of firearm by convicted person	no statutory penalty			
45-8-314. Lifetime firearms supervision of certain convicted person (NOT A CRIME)				
45-8-316. Carrying concealed weapons	MISDEMEANOR			
(second offense)	FELONY			X
45-8-318. Possession of deadly weapon by prisoner or youth in facility	FELONY			X
45-8-327. Carrying a concealed weapon while under the influence	MISDEMEANOR			
45-8-328. Carrying a concealed weapon in prohibited place	MISDEMEANOR			
45-8-331. Switchblade knives	MISDEMEANOR			
45-8-333. Reckless or malicious use of explosives	MISDEMEANOR			
45-8-334. Possession of a destructive device	FELONY			X
45-8-335. Possession of explosives	FELONY			X
45-8-336. Possession of a silencer	FELONY			X
45-8-339. Carrying firearms on trains -- penalty	MISDEMEANOR			X
45-8-340. Sawed-off firearm	MISDEMEANOR			
(second offense)	FELONY			X
45-8-361. Possession or allowing possession of weapon in school building	MISDEMEANOR			
Chap 9 - Dangerous Drugs				
<u>PART 1 Offenses involving Dangerous Drugs</u>				
45-9-101. Criminal distribution of dangerous drugs	FELONY		10 YRS	
45-9-102. Criminal possession of dangerous drugs	////////////////////////////////////			
marijuana and anabolic steroids	MISDEMEANOR			
opiate	FELONY		5 YRS	
marijuana (second offense)	FELONY		5 YRS	
not otherwise provided	FELONY		5 YRS	

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
45-9-103. Criminal possession with intent to distribute				
opiate	FELONY		5 YRS	
not otherwise provided	FELONY		5 YRS	
45-9-104. Fraudulently obtaining dangerous drugs	FELONY		10 YRS	
(second offense)	FELONY		10 YRS	
45-9-105. Altering labels on dangerous drugs	MISDEMEANOR			
45-9-107. Criminal possession of precursors to dangerous drugs	FELONY		5 YRS	
45-9-109. Criminal distribution of dangerous drugs on or near school property	FELONY		10 YRS	
45-9-110. Criminal production or manufacture of dangerous drugs	FELONY		10 YRS	
45-9-112. Criminal distribution of imitation dangerous drug	FELONY		10 YRS	
(distribution to person over 18)	FELONY		10 YRS	
(distribution to person under 18)	FELONY		10 YRS	
45-9-113. Criminal possession of imitation dangerous drug with the purpose to distribute	FELONY		10 YRS	
45-9-114. Criminal advertisement of imitation dangerous drug	FELONY		10 YRS	
45-9-115. Criminal manufacture of imitation dangerous drug	FELONY		10 YRS	
45-9-121. Criminal possession of toxic substances	MISDEMEANOR			
45-9-125. Continuing criminal enterprise	FELONY			X
45-9-127. Carrying dangerous drugs on train	see penalty at 45-9-102			
45-9-132. Operation of unlawful clandestine laboratory	FELONY		10 YRS	
Title 61 - Driving Under the Influence of Alcohol or Drugs (61-8-401)				
(first - third offense - 61-8-714)	MISDEMEANOR			

Attachment D
Relevant Crimes and Disqualifying Events
December 2008

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
(fourth or subsequent offense - 61-8-731)	FELONY		10 YRS	
Title 52, Chapter 3, Part 8 - Montana Elder and Persons With Developmental Disabilities Abuse Prevention Act				
52-3-825. Penalties				
(1) failing to make a report, failing to disclose contents of case record or report	MISDEMEANOR			
(2)(a) abuse, sexual abuse or neglect	FELONY	X		
(2)(b)(i) negligent abuse (first offense)	MISDEMEANOR			
(2)(b)(ii) negligent abuse (second or subsequent offense)	FELONY	X		
(3)(a) exploiting in amount of \$1,000 or less	MISDEMEANOR			
(3)(a) exploiting in amount of \$1,000 or more	FELONY	X		
Title 33, Chapter 1, Part 12 - Insurance Fraud Protection				
33-1-1211. Penalties.	MISDEMEANOR			
Title 53, Chapter 2, Part 1 - Social Services Institutions, Administration of Public Assistance, General Provisions				
53-2-106. Penalty for misuse of public assistance information	MISDEMEANOR			
53-2-107. Fraudulent obtaining of public assistance treated as theft				

SJ 7--Examination of Requiring Criminal Background Checks for Direct-Care Workers

Appeals Processes Recommendation for Appeals Process in Montana

This document serves as a summary of the appeals process regarding the work performed by Department of Public Health and Human Services (DPHHS) (Department), Department of Justice (DOJ), and interested members of the public on Senate Joint Resolution 7 (SJ 7). Specifically regarding provision (5) of the resolution to: "establish an appeals process for applicants who are denied employment because of the results of a background check."

10 State Summary: From January 2008

Seven States have identified Appeal Processes (Alaska, Arizona, Idaho, Minnesota, New Mexico, Oklahoma, and Oregon)

- Three States limit the appeal to crimes which fall outside of their 'permanent' categories.
- Four States use a committee structure to make decisions, while the other three involve a Commissioner or other designated department staff person.
- One State limits appeals to areas involving their central abuse registries.

Two States (Kansas and Nevada) limit the appeal process to the accuracy of the criminal record only. No other considerations are allowed.

One State - no response, nothing specific found in their on-line statutes.

During the discussion at the February 2008 SJ 7 workgroup meeting, the workgroup was presented a proposal to follow the strategies of Kansas and Nevada and adopt a process which limits any "appeal" to the accuracy of the criminal history record only. This proposal was discussed and rejected by the workgroup and the Department staff was directed to prepare an appeals process for Montana that would allow an applicant the ability to not only appeal the accuracy of the criminal history record but also appeal a notification of a disqualifying criminal history record.

Based upon this direction the Department has reviewed the information obtained from the 10 States identified by the workgroup and prepared the following recommendation for an Appeals Process for Montana.

Appeals Process for Montana

Appeal the accuracy of the criminal history record Department of Justice (DOJ)

Montana will allow the individual to follow the appeal process established through the criminal justice legal system. This appeal process will be defined by the Montana Department of Justice (DOJ). If an applicant is successful in getting a conviction overturned or expunged then DPHHS officials will rescind the prohibition under Montana law.

If a person challenges a denial of an opportunity to volunteer or be employed by the authorized entity on the basis of a criminal history background check result, the person can be provided a copy of the criminal history record after verifying their identity. If a person believes their criminal history record is in error, they must contact DOJ for assistance in correcting the error. Procedures for challenging and correcting criminal record information are contained in 44-5-215, MCA. There is a \$10 charge if fingerprint verification is required for a Montana record; \$18 if for an FBI record.

Appeal a notification of a disqualifying criminal history record Department of Public Health and Human Services (DPHHS)

1. If the criminal history record check reveals a disqualifying event, the facility/employer will be notified that the individual has a disqualifying background and is not considered approved as a direct-care access employee. However, should the facility/employer believe that in spite of the disqualifying event the individual deserves reconsideration on the grounds that the individual has been 'sufficiently rehabilitated to warrant the public's trust,' the facility/employer must submit such request in writing to the Department.
2. To appeal the notification of a disqualifying criminal history record the request is to be made directly to the Quality Assurance Division (QAD) who will be responsible for the program administration. The appeal process will be referred to as "Administrative Reconsideration (AR)". This process is intended to be an informal nonadversarial administrative review of written documentation.
3. The QAD program will conduct an AR on the basis of the applicability to the law and requirements for disqualification based upon the criminal history record. This review will be based upon the written and complete request for reconsideration and all supporting documents (see below) submitted. Additional documentation can be requested by the Department.
4. The appeal will not be allowed based upon the provider's determination of employment, but rather that the facility/employer believes that the individual has been 'sufficiently rehabilitated to warrant the public's trust' and as such, the appeal will be based upon the applicant's ability to demonstrate that accordingly.

5. QAD will initiate a joint review of all requests for AR and determine an Approval of the AR or Denial of the AR. The committee for this Joint Review will be defined by administrative rule.*
6. All AR denials will require a peer review by a professional in the criminal justice system (TBD).*
7. The right to appeal all AR denials and request a "Fair Hearing" will be provided. The Fair Hearing will be conducted by the Office of Fair Hearings at DPHHS in accordance with the Montana Administrative Procedure Act (MAPA) and the Department's Administrative Rules of Montana. The Hearing Officer will have the ability to uphold the AR denial or overturn the AR denial, based upon the evidence presented in accordance with 2-4-612, MCA.
8. A party aggrieved by a final Fair Hearing decision may seek judicial review.

**At the April 2008 meeting of the workgroup, concern was expressed about contents of (5) (joint review) and (6) (peer review). Some committee members including DOJ staff were concerned about the State's liability around making such determinations; other concerns were expressed about who would serve on this peer review and whether those identified as potential committee members had the responsibility to perform such tasks.*

All approval determinations are limited to the application of the disqualifications based upon the criminal history record as contained in the law or administrative rule and will not be a determination to require an employer to hire an applicant.

All decisions regarding the employment of an applicant are at the employer's discretion. All applicable state and federal laws regarding discrimination and civil rights apply.

Approval decisions are specific to the individual facility/employer who requested the AR; in other words, if an applicant is given approval after an AR that decision applies *only* to the facility/employer that requested the appeal. Any approval granted by the Department is not to be considered a blanket approval.

Montana will use a documentation requirement and process that is similar to that used by the state of New Mexico.

Administrative Reconsideration - An individual, who has received notification of a disqualifying criminal history record, must submit a written request for administrative reconsideration.

The documentation submitted with the request for an administrative reconsideration must include the following:

1. A comprehensive rationale for why the AR should be granted;
2. A demonstration that in spite of the conviction, the health, safety, and welfare of recipients will not be impacted;

3. Letters of recommendation from credible persons not related to the individual;**
4. Credible and reliable evidence of the actual disposition of any arrest for which the nationwide criminal history was incomplete;
5. The age of the individual at the time of each disqualifying conviction;
6. Any mitigating circumstances when the offense was committed;
7. Any court imposed sentence or punishment and if completed, the date of completion;
8. Any successfully completed rehabilitation program since the offense;
9. The individuals full employment history since the disqualifying convictions; and
10. Other relevant materials the individual may wish to submit or other information specified by the respective Department program.

*** At the February 2008 meeting of the workgroup, self-direct programs and the appeals process were discussed. After further review, the department finds that in the case of self-direct programs, the provision disallowing letters of recommendation from persons related to the applicant may be too prohibitive. The administrative rulemaking process would address this issue.*

Factors in Making Determination:

1. Must consider the "Act" as defined by the legislature (TBD);
2. The severity or nature of the crime or other findings;
3. Total number of disqualifying convictions and pattern of incidents;
4. Time elapsed since last disqualifying conviction or since discharge of the sentence;
5. Circumstances surrounding the incident that would help determine the risk of repetition;
6. Circumstances of the crime including whether violence was involved;
7. Relationship of the incident to the care of children or vulnerable adults;
8. Activities evidencing rehabilitation (substance abuse or other rehabilitation programs);
9. Whether conviction was expunged by the court or whether an unconditional pardon was granted;
10. False or misleading statements about any conviction in the signed declaration;
11. Evidence that the individual has attained sufficient rehabilitation to warrant the public's trust;
12. Age of the individual at time of the disqualifying conviction;
13. Granting of a pardon by the Governor or President; or
14. The falsification or omission of information on the application form and other supplemental forms submitted.

Grounds for Reconsideration Clearance Determination: Clearance can be given when the request for reconsideration and the accompanying documentation clearly demonstrates that the individual has satisfied *one* of the following grounds for such clearance:

1. Inaccuracy - The record inaccurately reflects a disqualifying conviction. Includes factual error, error in the Departments' application or use of the applicable criminal statute/standard, conviction that lacks a final disposition.
2. Sufficient rehabilitation to warrant the public's trust.

DPHHS will refine and define this process through the administrative rule process as granted in the "Act."

SJ 7--Examination of Requiring Criminal Background Checks for Direct-Care Workers

Cost Analysis Summary

This document serves as a summary of the costs and sources of funding regarding the work performed by Department of Public Health and Human Services (DPHHS) (Department), Department of Justice (DOJ) and interested members of the public on Senate Joint Resolution 7 (SJ 7). Specifically regarding provision (6) of the resolution to: "determine the estimated cost and sources of funding for implementing the system of criminal background checks outlined in the proposal."

The Option

While the work group agreed that fingerprint criminal background checks were the best method of addressing this issue, several options were debated and discussed before consensus was reached. The work group discussed four options ranging from doing nothing different from what is currently done by providers to full fingerprint background checks. The reasons the workgroup decided that fingerprint background checks were the best option includes:

- Fingerprint checks extend beyond current requirements for licensing requirements
- Fingerprints are the most accurate means to identify an individual
- Fingerprint checks alert employer to inaccurate information provided such as misspelled names and inaccurate social security numbers
- Fingerprint checks include aliases and charges pending
- Fingerprint checks do not preclude the employer from performing an additional type of background check (credit, driving records, etc.)
- Fingerprint checks are the only method available to obtain a national check

Estimated Costs – Fingerprint Background Check

The cost of a fingerprint criminal background check and related costs are estimated to be approximately \$1.4 million in the first full year of operations and then reduce to approximately \$939 thousand in the second year. Associated start up costs prior to the first years of operation are estimated to be approximately \$336 thousand to account for associated start up costs to establish rules and regulations for the program, hire staff, build data systems, provide training, and build the infrastructure for the program. Beginning in state fiscal year (SFY) 2011 the state will process background checks. The processing of the background checks will be a significant start up effort to cover the existing workforce after considering grandfathering and workforce turnover, and new employees to the workforce. After the first few years of processing background checks, the costs are expected to reduce in year three and four to approximately \$745 thousand and \$730 thousand respectively.

Table 1	SFY 2009	SFY 2010	SFY 2011	SFY 2012	SFY 2013	SFY 2014
Total Costs	\$13,567	\$321,906	\$1,407,772	\$939,047	\$745,493	\$730,831

The majority of this cost from 2011 through 2014 includes an estimate of the cost of the fingerprint background check depending on the type of fingerprint background check used and the extent of cost sharing by the employer.

The resolution identified a fingerprint process through the Federal Bureau of Investigation (FBI), but the study results identified another alternative resource that is equally effective. That resource is a fingerprint check process through the Western Identification Network (WIN). A national FBI background check can be completed for \$29.25 plus the cost of obtaining the fingerprints, and a WIN background check can be completed for \$10.00 plus the cost of obtaining the fingerprints. This cost analysis is based upon utilization of the lower cost WIN fingerprint background check for the workforce that are native Montanans or those individuals that came to Montana from a WIN state. The balance of the workforce will require an FBI fingerprint background check.

The cost of obtaining fingerprints can vary from \$5.00 to \$40.00 depending on where the fingerprints are taken. For the purposes of this study and the cost analysis, an estimated cost of \$20.75 for obtaining fingerprints was used, resulting in an estimated cost of \$50.00 for an FBI check and \$30.75 for a WIN check. Based upon the workgroup discussions an accurate amount could not be determined. Therefore, for simplicity in estimating a cost for fingerprint background checks an average of \$20.75 was used for this analysis. The workgroup considered this to be a reasonable estimate for purposes of the cost analysis, recognizing the actual costs of the obtaining prints is unknown. Therefore, the cost estimates could be lower if a cost effective program can be implemented to assist employers in obtaining fingerprints for their prospective employees. For example, if the fingerprints could be obtained from the employer or another entity, and a third party is not involved requiring payment for this service, then the costs could be reduced by up to \$20.75 per check.

Another key factor in determining the cost of the fingerprint background check is the extent of the cost sharing by the employer. The workgroup discussed the financial impact that any change in current practice might have on employers. The workgroup believed that the cost of a fingerprint based background check cannot be born entirely by the employer. However, the workgroup also recognized that employers are currently incurring some costs to perform background checks on employees and that amount is approximately \$10.00 - \$11.50 per check, to the extent that they are utilizing the services provided by DOJ for name-based background checks. Some providers are paying more if they utilize private entities to conduct this service. The workgroup suggested a shared cost concept of the fingerprint process; it was determined to be reasonable that providers share in the cost of this public policy. Therefore, for the purposes of this cost analysis this cost sharing amount was determined to be \$11.50 per fingerprint check.

Therefore, depending on the type of fingerprint background check (FBI or WIN), as mentioned earlier, the incremental cost after considering the employer cost sharing is \$38.50 (\$50.00-\$11.50) for an FBI check and \$19.25 (\$30.75-\$11.50) for a WIN check. The cost analysis contained in this study recognizes this cost sharing assumption resulting in a fingerprinting cost of approximately \$976 thousand dollars first year and reducing to approximately \$270 thousand dollars in the fourth year of operations (see Table 2).

Table 2	SFY 2011	SFY 2012	SFY 2013	SFY 2014
Estimated cost with FBI check	\$585,350	\$299,000	\$177,050	\$161,900
Estimated cost with WIN check	\$839,998	\$429,086	\$254,087	\$232,347
Total Estimated cost of fingerprint check	\$1,425,348	\$728,086	\$431,137	\$394,247
Less: Estimated provider cost sharing	\$448,776	\$229,241	\$135,746	\$124,131
Net cost of fingerprint check	\$976,572	\$498,845	\$295,391	\$270,116

The following information provides the basis of the data used and the assumptions that yielded the estimates for this cost analysis:

It is estimated that there are approximately 50,500 employees subject to the criminal background check in Montana in the service settings identified by the study. This count was determined by utilizing data from the Department of Labor and Industry, Research and Analysis Bureau, and estimates by DPHHS regarding the number of individuals in self directed programs. It is possible that this count is overstated with duplicates but after discussion with the workgroup it appears reasonable. To our knowledge, no information is available to provide an exact count of employees in the identified services settings that also accounts for vacancies and turnover. Therefore, for purposes of this cost analysis a base of 50,500 individuals is used for calculating the estimated cost of the fingerprint background check.

In assessing the impact of the proposal, a couple of significant factors to consider are the impact of turnover in the health care industry and grandfathering the existing workforce. Estimates vary widely on the turnover rates and they often vary based upon the occupation. Most of the published studies relate to the long-term care industry and the turnover rates for nurses and nurse aides. To our knowledge, the studies we reviewed do not address other occupations such as maintenance, administration, and housekeeping. Therefore, for purposes of this analysis the department attempted to identify a reasonable turnover rate for the services settings. To do this we utilized a 2002 report from the American Health Care Association (AHCA) as a basis and included anecdotal information from workgroup meetings to determine the turnover rate. For purposes of this cost analysis we are utilizing a turnover rate of 68.9% for all

services settings and positions. We recognize that some service settings and occupations experience higher turnover and some experience lower turnover rates.

The proposal under consideration provides for a grandfathering of all current employees in the workforce effective July 1, 2010. This means that if an individual is employed in a covered service setting the employer is not required to complete a fingerprint background check on that employee; that employee would be grandfathered into the program as long as that individual remains in the same position. Therefore, this policy naturally provides for a phase in approach when the 68.9% turnover rate is applied to the workforce. It is estimated that 98% of the employees in covered services settings will have completed a fingerprint criminal background check within four years, see Table 3. If an employee was grandfathered as of the implementation of this proposal, a fingerprint background check would be required when or if that employee changed employment.

The projection also includes an estimate of new employees to the health care industry (workforce), in terms of newly certified or licensed professionals and other professionals. This estimate amounts to approximately 9-10 thousand new individuals per year. This figure was based upon a factor of 10% of the total workforce and an average of the new licenses issued by Department of Labor and Industry for the nursing profession, and new certifications issued for nurse aides. The estimated numbers of background checks to be conducted over a four-year period are outlined in Table 3.

Table 3	SFY 2011	SFY 2012	SFY 2013	SFY 2014
Estimated number of background checks – Turnover	34,795	10,655	2,525	1,515
Estimated number of new employees to services settings or newly licensed or certified	4,229	9,279	9,279	9,279
Total Estimated count of background checks required	39,024	19,934	11,804	10,794

To determine the cost of the fingerprint background checks an estimate of the type of background check, FBI or WIN, needed to be determined. As mentioned earlier, the workgroup determined that utilization of the lower cost WIN fingerprint background check (\$10.00) would be beneficial and equally as effective as an FBI check. The WIN check would apply to the workforce that is native Montanans or those individuals that came to Montana from a WIN state. The rest of the workforce would require an FBI fingerprint background check.

To determine this split in workforce, the department contacted staff in the Department of Labor and Industry and the Department of Commerce and obtained data from those agencies that indicates this split to be approximately 70/30. Seventy percent (70%) that represents native Montanans or individuals that comes from WIN states and thirty percent (30%) that represents individuals from other states.

Utilizing the data on the number of background checks required (Table 3), the relative utilization of FBI vs. WIN checks (70/30), and the estimated costs per background check we determined an estimated cost for conducting fingerprint background checks for Montana. From this cost we applied a provider cost sharing of \$11.50 per check, resulting in a net cost that reflects the type of fingerprint background check \$38.50 (\$50.00-\$11.50) for an FBI check and \$19.25 (\$30.75-\$11.50) for a WIN check (Table 2).

It is important to note that the total costs of the fingerprint background check is dependent on the fee charged by DOJ, (\$29.25 for FBI and \$10.00 for WIN), the cost of obtaining the prints (\$20.75) and the relative utilization of the type of fingerprint check used, FBI or WIN. When this program is implemented in July 2010, it is possible the fees may be more than that currently charged by DOJ. Conversely, given the volume of background checks required under this proposal, it is possible that a new rate may be negotiated with DOJ or a new rate may be determined by legislative action based upon the costs to provide this public service. Therefore, the estimated cost could be considered a worst case scenario.

Administrative Costs – DPHHS

It is assumed that DPHHS will be the agency responsible for implementation of the criminal background check program primarily as it is related to the regulatory authority to license and certify many of the health care facilities and services identified in the services setting definition. This program function would be administered by the Quality Assurance Division (QAD).

This program will require several positions to fulfill the administrative responsibilities to implement rules and regulations, maintain the proposed registry, and provide effective communications to providers subject to this requirement. These responsibilities include, but are not limited to, systems maintenance and data entry to the proposed registry, letters and correspondence, training and technical assistance, processing of appeals, and legal support.

Staffing for this program will require one FTE for program management, up to two FTE initially for administrative activities and one FTE for expected hearings related to this requirement. Legal costs will be required to develop a matrix to determine if crime(s) in another state is "reasonably equivalent" to the crime listed under the Montana statute. This will require legal expertise to review laws from other states and make this determination. We expect that this can be done under a contract for this legal service with continued support by DOJ staff which we estimate will require ½ FTE on an ongoing basis. The legal support by DOJ is necessary related to the criminal justice expertise. DPHHS legal staff will provide assistance as needed regarding appeals and program management. The work regarding the disqualifying events and the reasonable equivalent will possibly require development of a database to establish the relationships between the various state and federal laws.

In addition, the Department expects to incur programming costs to develop the proposed registry. This registry is planned to be a resource for employers to verify if a criminal background check was already completed on a prospective employee. The registry will provide secure access for employers to maintain the integrity and security of the database. An employer will be able to check this registry, and if an employee has had a criminal background check done, another fingerprint check will not be required. The registry will identify the date the background check was done and provide the employer with a certificate for their files to verify to regulators their compliance with this requirement. We believe the establishment of a registry is a key factor to keep the costs of the program under control. Without a registry, the providers in the identified services settings will be required to conduct significant numbers of fingerprint background checks at significant costs. This cost could be the burden of the State depending on which entity will bear the responsibility for this public service.

The total costs for each year are summarized in Table 4 and include personnel cost and related operating costs for staff.

Administrative Costs – DOJ

The administrative costs for the Department of Justice (DOJ) primarily pertain to the impact on staffing and related costs for the Criminal Records Section. Under current authority, DOJ is permitted to add staff for additional workload. However, it is under the understanding that this is based on historical data. DOJ may be given additional staff to handle the influx, but that would not take place until after the initial year had passed. Therefore, in order to process the volume of fingerprint background requests expected by this proposal, DOJ would need to have new staff hired and trained prior to the initial influx of this program. In addition, it is anticipated that additional legal assistance will be required by the Attorney General's office to support the program, specifically with regard to support of the reasonably equivalent determination of crimes in other States compared to crimes identified as disqualifying events under the Montana statute. This additional, legal effort is estimated to be ½ FTE to provide this level of effort. Therefore, the total administrative costs are estimated at 3½ FTE for a new attorney, fingerprint technician, auditor, and trainer.

Table 4	SFY 2009	SFY 2010	SFY 2011	SFY 2012	SFY 2013	SFY 2014
DPHHS Admin	\$13,567	\$259,361	\$225,224	\$229,792	\$225,127	\$241,037
DOJ Admin	\$0	\$62,545	\$205,976	\$201,410	\$214,975	\$219,678
Total	\$13,567	\$321,906	\$431,200	\$440,202	\$450,102	\$460,715

Provider Costs

The department did not conduct a thorough analysis of the total provider costs to implement a fingerprint background check process. Based upon the discussions of the workgroup, it was determined that many providers already conduct some type of criminal background checks on prospective employees. Some utilize independent contractors to provide this service, and some utilize the resources provided by the DOJ, Criminal Records Sections via the web based tools that are readily available to the public. (See <http://www.doj.mt.gov/enforcement/criminaljustice/backgroundchecks.asp>).

To get an idea of the scope to which providers conduct criminal background checks, DPHHS conducted a survey of providers in March 2008. This survey revealed that approximately 87% percent of those that responded indicate that they perform some form of criminal background checks on applicants before employment. Of those that responded over 51% utilize a name based check via the resources provided by DOJ. In addition, respondents also indicated other resources that are utilized such as fingerprint checks, private services, Internet checks, credit checks, and reference checks.

The workgroup discussed the financial impact that any change in current practice might have on employers. The workgroup believed that for a fingerprint based background check that the cost cannot be born entirely by the employer (providers). However, the workgroup also recognized that providers are currently incurring some costs to perform background checks on employees. In addition, providers are incurring other administrative costs already to perform this function related to employment. The administrative level of effort to conduct fingerprint criminal background checks vs. name based checks could arguably be similar in that it involves staff to perform the check, and analyze the results when considering an employment offer. The proposed process would involve mailing costs, other administrative costs, and timelines that might be different from their current practices. However, there is no denying that providers/employers do have administrative costs associated with this function.

For this reason, the workgroup suggested a type of shared cost of the fingerprint process. After considerable discussion it was determined to be reasonable that providers share in the cost of this public policy by reducing the cost by \$11.50 per fingerprint check, and recognize that providers have other administrative costs they may already be performing regarding background checks on employees.

Sources of funding – DPHHS/DOJ

Based upon the costs estimates as noted in this analysis the sources of funding include a myriad of possibilities depending on the responsible entity and how the project is implemented.

The obvious sources of funding for a new fingerprint based background check are: an appropriation from the general fund; utilization of funds from the health and Medicaid initiatives account (tobacco taxes raised by I-149), tobacco settlement funds, and interest on the tobacco settlement trust fund. In addition, a possible combination of these funding sources could be utilized with matching of federal funds, such as

Medicaid. Another source could include a federal grant from the Department of Health and Human Services. For example, several States have received grants under a CMS Pilot Project for background checks (AK, ID, IL, MI, NV, NM, and WI). Lastly, the State could charge a licensing fee to providers or require providers to incur the cost of the fingerprint check to DOJ to cover the cost of the program. The later of which is not the preferred method based upon the discussion of the workgroup. In fact one workgroup member stated that if the cost was born by the provider then there is an expectation the State would absorb the administrative costs to implement the program. It is clear based upon the costs noted above that both would require a significant burden upon the providers and the State to implement and administer.

The cost analysis also recognizes the direction by the workgroup to include a discussion on the possibility of obtaining federal Medicaid matching funds for the cost of the fingerprint checks as well as the administrative costs to conduct the fingerprint check process. Several of the workgroup members stressed the importance of this federal Medicaid funding to the success of this proposal.

The Medicaid program provides matching funds, and the matching funds are often referred to as Federal Financial Participation (FFP). The level of the FFP varies based upon the program or service provided by the State Medicaid Agency (DPHHS). Generally, FFP is provided at 50% for administrative costs to manage the Medicaid program, but the administrative FFP can be provided at 75% or at 90% under certain circumstances, such as claims processing systems or the development of claims processing systems. Matching funds are also provided to states for benefits paid on behalf of clients to health care providers. This is commonly referred to as the Federal Medical Assistance Percentage (FMAP) which, for Montana is currently set at approximately 67%. This FMAP for benefits can be provided at higher rates such as 80% for breast and cervical cancer programs and at 90% for family planning services. However, in order for a State to claim the Medicaid match, it must comply with the requirements identified by the Centers for Medicare and Medicaid Services (CMS). Based upon our review of the Code of Federal Regulations (CFR) and discussion with CMS representatives, matching funds may be available under the FMAP for benefits, but may not necessarily be available for the administrative costs under the proposed program.

In order for the costs to be funded and claimed as a FMAP benefit, the cost would need to be considered in the rate setting methodology for the program or service or as a direct benefit to Medicaid based upon Medicaid utilization, such as that provided for under the direct care wage increase. The costs would then be considered a cost of doing business and the provider would be paid for the costs via their reimbursement under the appropriate fees for services provided to Medicaid clients. This assumes that the provider would be responsible to pay the cost of the fingerprint background check. It is our understanding that some states have implemented a similar methodology to claim this cost of doing business as Medicaid benefits, but it appears to have been done on a smaller scope than what is planned for this project. For example, this is being done in Montana for the Disability Services Division and their Home and Community

Based Services (HCBS) waiver program. In addition, it is our understanding that this is how it works in South Carolina for certain settings. The critical aspect of this is that the provider incurs the cost of the background check, thus it is considered a cost of doing business; therefore, it would need to be included in the reimbursement rate or other approved methodology under Medicaid. It is a possible scenario that would require a significant level of effort by the state in order to update the reimbursement methodology (and obtain CMS approval) to show the cost of performing the background check is included in the reimbursement. In addition, the concept might be more attractive to those providers that have a significant level of Medicaid business but it becomes more complicated for those providers that have little or no Medicaid utilization, such as Assisted Living Facilities and Hospitals.

For example, Assisted Living Facilities have very little Medicaid utilization and Hospitals average approximately 15% Medicaid statewide. A hospital has a high number of employees and Assisted Living Facilities can have several employees depending on their size. If the provider is required to pay the cost of the fingerprint background check at the rate of \$30.75 or \$50.00 and can only be reimbursed approximately 15% or less of this cost by Medicaid, then this is a substantial burden upon the provider for this public policy. Those providers that have Medicaid utilization at or above 50%, such as Nursing Facilities, group homes, and mental health providers would fare better with their Medicaid reimbursement, but again they would be responsible for the balance of the costs. This could possibly result in cost shifting to other payers and those receiving services under private pay arrangements.

The department estimated the availability of Medicaid matching funds by utilizing rough averages of Medicaid utilization by type of provider, weighted by the number of employees expected to be covered under this project. The average Medicaid utilization was estimated to be approximately 40% utilization statewide. Therefore, assuming 40% utilization for the cost of the fingerprint background checks as identified in Table 2, at the applicable FMAP rate, the potential Medicaid funding available for this program would be \$544 thousand over the four-year period. See Table 5.

Table 5	SFY 2011	SFY 2012	SFY 2013	SFY 2014	Total
Cost of back-ground check (Table 2)	\$976,572	\$498,845	\$295,391	\$270,116	\$2,040,924
Est. Medicaid @ 40%	\$390,629	\$199,538	\$118,157	\$108,046	\$816,370
Medicaid FMAP	67%	66.57%	66.16%	66.09%	
Medicaid Funding	\$261,721	\$132,832	\$78,173	\$71,408	\$544,134

Medicaid FFP is not available for administrative costs of the State Agency or for the administrative costs of the Department of Justice. Based upon our research and discussion with CMS, the administrative costs associated with the background checks are not necessary for the proper and efficient administration of the Medicaid program (State Plan). A requirement for criminal background checks for the employees of a provider is considered a state public policy requirement and not necessarily a requirement of the Medicaid program to be a provider of service. Therefore, the

associated costs are not directly related to the administration of the Medicaid program and cannot be claimed by the state agency as an administrative cost.

One possible alternative that may qualify the related administrative costs to Medicaid would be a methodology that requires fingerprint criminal background checks for participation in the Medicaid program, as part of the provider enrollment process. This would create a link to Medicaid. The department in turn could utilize this employee information as a resource for providers to ensure compliance with Federal requirements regarding excluded individuals or entities per section 1128B(f) of the Social Security Act. Under provisions of this act the Office of Inspector General (OIG) maintains a list of excluded individuals and entities that cannot participate in federal health care programs. The OIG excludes individuals and entities from participation and payment for any items and services furnished, ordered, or prescribed by excluded individuals until the provider has been reinstated by the OIG. This includes the federal health care programs for Medicare, Medicaid, and CHIP, as well as other federal programs. The department could provide a service to providers by checking every employee against this list and notify the provider of a possible conflict regarding employment, which would jeopardize their participation in the federal programs.

The shortcoming of this methodology might be that it could create unintended consequences as CMS could take the stance that all providers would be subject to this requirement, which would include provider groups not included in this proposal, such as physicians, pharmacies, dental, etc. Research with other states indicates that they claim some administrative costs for criminal background checks but it appears to be limited to the individual provider and not the employees of the provider.

Medicaid funding is possible for the cost of the fingerprint background checks but, according to CMS, the cost of the check must be incurred by the employer (provider). The costs would then be considered a cost of doing business and the provider could be reimbursed for these costs via the Medicaid rate setting methodology for the specific program or service, or an alternative reimbursement methodology could be developed that is based upon Medicaid utilization for the program or service. The key requirement according to CMS for federal Medicaid participation as a Medicaid benefit is that the provider would be responsible to pay the cost of the fingerprint background check. This requirement conflicts with the general consensus of the workgroup in their discussion to propose a fingerprint background check process.

In summary, the cost of the fingerprint criminal background check is significant when considered for all employees in the identified services settings. This cost could be reduced through creative resources to obtain the prints and processing fees charged by DOJ. The administrative costs for both DPHHS and DOJ are significant as well, as they generally are for new programs. However, both agencies recognize the need to control the costs to provide effective and efficient program administration as the timely processing and response by the state agencies is critical to the success of this proposed program.

The costs related to the other options identified by the workgroup have not been determined. Obviously, there will be similar administrative costs to provide effective and efficient program administration, but the level of effort would be less complicated and involved. It is anticipated that the staffing needs would be less for administrative functions, which would also reduce the other operating expenses appropriately. The department expects a similar level of effort: to develop a registry, to develop a matrix establishing the comparability of crimes in other states to the crime listed under the Montana Statute, and to develop the appeal process.

SJ 7 Options for Background Checks Disqualifying Events Exist for All Options

Option 1

Full Fingerprint Background Check

- Staff for all designated service providers would be subject to fingerprint checks
- Checks could be National (FBI) or Western Identification Network (WIN) states only (Alaska, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming)
- Establishes a registry of all direct-care access workers' fingerprint check results

Option 2

Criminal Background Check Required and the State Prescribes a Process of a Progressive Check

- Establishes a risk analysis process for criminal background checks beginning with a name based check through the DOJ
- Staff for all designated service providers would be subject to checks
- Begin with a name based check if applicant has lived only in MT for the past 5 to 10 years
- If the name based check reveals any criminal activity, a full fingerprint background check is required.
- If the applicant has moved to MT within the last 5 to 10 years and is from a WIN state, a WIN state fingerprint check is required
- If the applicant has moved to MT within the last 5 to 10 years and is from a non WIN state, a full FBI fingerprint check is required

Option 3

Some type of Criminal Background Check Required. Employer has policies and procedures to determine their process. DPHHS will explain possibilities but the employer will decide.

- Staff for all designated service providers would be subject to checks
- Possibilities include named based check, use of a private background check company, WIN state check, full FBI check.
- Reference checks alone are not sufficient
- If the applicant is from another state, a MT name based check is not sufficient

SJ 7 Options for Background Checks Disqualifying Events Exist for All Options

OPTION 1

- Pros**
- * Extends beyond current requirements for licensing requirements
 - * Fingerprints provide the most reliable result to identify an individual
 - * Alerts employer to inaccurate information provided such as misspelled names and inaccurate social security numbers
 - * Includes aliases, charges pending
 - * Does not preclude the employer from performing an additional type of background check
 - * Only method available to obtain a national check
- Cons**
- ~ Cost of processing the check and the variable cost of obtaining fingerprints
 - ~ May create fear about privacy issues and the security of the results
 - ~ Requires an administrative process for handling the information
 - ~ Increased workload and fiscal impact to DOJ
 - ~ Considered invasive by some
 - ~ May deter applicants because of waiting period for prints to be processed
 - ~ May present a burden to employer due to timeliness of fingerprint process
 - ~ Fingerprints might need to be rerolled, and for a select few, fingerprints will be impossible to obtain. At that point, a Federal name based check would be completed.
 - ~ Requires statutory change to meet PL 92-544 requirements

OPTION 2

- Pros**
- * Extends beyond current requirements for licensing requirements
 - * Not as invasive to MT residents
 - * Should capture those coming from another state with a criminal history
 - * Turn around time for name based checks may be faster than fingerprints
 - * Does not preclude the employer from performing an additional type of background check
 - * May be less costly than Option 1
 - * May be more timely than Option 1
 - * If fingerprints are required, the same Pros as Option 1 would apply
 - * Empowers employers to direct their own hiring practices
- Cons**
- ~ MT name based check through DOJ only identifies crimes committed in MT
 - ~ May not identify a crime committed in another state even if perpetrator was a MT resident
 - ~ Might require start-up education and training for employers
 - ~ Requires a risk analysis by the employer to determine MT residency
 - ~ If fingerprints are required, the same CONs as Option 1 would apply
 - ~ Name based checks are subject to the accuracy of the information provided by the applicant; increased chance of false or missed matches
 - ~ Employer will be required to benchmark a crime against a list of disqualifying events
 - ~ May take more time and resources in managing and verifying information provided by applicant
 - ~ Requires statutory change to meet PL 92-544 requirements if fingerprint based

OPTION 3

- Pros**
- * Extends beyond current requirements for licensing requirements
 - * Based on self reported behavior
 - * Gives employers discretion with their own hiring practices
 - * Less costly than options 1 and 2 both administratively (STATE) and to the employer; employer controls cost
 - * Does not preclude the employer from performing an additional type of background check
 - * May require less time to receive a report
- Cons**
- ~ Requires that employer make a risk assessment of the applicant and the appropriate type of check needed to ensure resident, patient, client safety
 - ~ Inconsistent process with services delivery providers
 - ~ Least dependable of the three options for providing accurate information regarding criminal history
 - ~ MT name based check through DOJ only identifies crimes committed in MT
 - ~ Some employers may not be as diligent as others, and the vulnerable populations may be at risk
 - ~ Name based checks are subject to the accuracy of the information provided by the applicant
 - ~ Requires a risk analysis by the employer to determine MT residency
 - ~ May be less portable if employee moves to another facility since no registry exists
 - ~ Private background check company unable to access information from the 7 states that don't share criminal conviction information
 - ~ Requires statutory change to meet PL 92- 544 requirements if fingerprint based

State Survey - Criminal Background Check

State Contact Info	Are there requirements under state law, admin rules or procedure?	Is criminal background ck: Named based, SSN ID, DOB, FP, FBI, other?	What services require bkg ck?	Do regulations specify which direct care workers required to have bkg ck?	Do regs identify disqualifying events/violations that bar emp?	Cost of bkg check?	Who pays for bkg check?	Who completes bkg check verification?	Does state provide appeals process?	Will state provide confirmation of bkg check completed w/in past year?
Alabama	No									
Alaska (CMS Pilot Prog) Mel Richardson Dept of Health Services 907-269-3615 MLRichardson@alaska.gov	Yes, state law and rule http://www.legis.state.ak.us/cgi-bin/folioisa.dll?stattx05/query=4712E0512E300/doc/%7B@20015%7D? http://www.hss.state.ak.us/publicnotice/PDF/145.pdf	Registry cks, name, SSN, DOB, FP (state & FBI)	LTC, ALF, retire hms, hm & comm based srvs, or any indiv or entity req to be licensed or certified by depart or rec payments from depart to provide srvs admin by depart	Yes 7 AAC 10.900(4)(b), RNs req as part of cert, MDs not req at this time	Yes 7 AAC 10.905 http://www.hss.state.ak.us/dph/CL/bgcheck/assets/BarrierCrimeMatrix.pdf	\$84 total: \$24 process fee, \$35 state & \$24 FBI. Volunteers pay \$59 for FP ck. \$25 if emp chgs job & bkg ck <6 yrs	Varies between provider & applicant	State agency, DHS, Certification & Licensure Sec	Yes	Yes Verify if employable or unemployable
Arizona Mike Timmerman AZ Dept of Public Safety 602-223-2639 mtimmerman@azdps.gov	Yes, state law http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/36/00411.htm&Title=36&DocType=ARS	Technical FP search at both state and FBI	Residential care institution, LTC, and HHA	Yes, employees, owners, and contracted persons who provide direct care, home health services, or supportive services	Yes http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/41/01758-03.htm&Title=41&DocType=ARS	Yes \$52 if paid emp of facility or \$46 if volunteer working in facility. \$24 (or \$18) to FBI, \$25 DPS, \$3 Admin Appeals Brd	Health care provider or health care worker -- employer decides	Dept of Public Safety	Yes	DPS can tell if valid FP clearance card issued or not
Arkansas Tommy Wingard Dept Human Services 501-682-6117 tommy.wingard@arkansas.gov	Yes, state law and admin rules Link to search code: http://www.arkleg.state.ar.us/NXT/gateway.dll?f=templates&fn=default.htm&vid=blr:code AR Code Ann. §20-33-201	Name based, SSN, driver's license, DOB. If applicant lived in state <5 yrs, req FBI ck	LTC, ALF, res care fac, ICFMR, ADC, HHA, and HPC	Yes, any individual who provides care or services and has direct access to residents, other than exempted "licensed" positions identified in §20-33-211	Yes, 37 disqualifying events identified in AR Code Ann. §20-33-205	\$22 state record ck and \$24 FBI	Health care provider or health care worker. Provider decides who pays	AK State Police	No, applicant would have to contact state police for any mistakes on applicant's record	Yes, only able to say whether applicant is eligible or ineligible to work
California Ms. Ley Arquisola CA Dept of Public Health 916-552-8893 larquiso@dhs.ca.gov	Yes CDPH regulates LTC, ICFDD & HHA http://www.leginfo.ca.gov/cgi-bin/calawquery?codesect=20, Secs 1338.5 & 1736.6 (ADC 1575.7)	SSN & FP	LTC, ICFDD, HHA & ADC (ADC not under contact's jurisdiction)	Yes, see quest 1	Yes http://www.leginfo.ca.gov/cgi-bin/calawquery?codesect=20, Sec 1337.9 & 1736.5	SSN & FP. No cost to applicant. Venders chg \$10-\$18 and Dept of Justice \$32	Health care provider or training facility. HHA pays own FP cost	CA Dept of Justice	Yes	Yes
Colorado	No									
Connecticut	No, only bkg ck for owner or applicant for license of nursing home									


State Survey - Criminal Background Checks

State Contact Info	Are there requirements under state law, admin rules or procedure?	Is criminal background ck: Named based, SSN ID, DOB, FP, FBI, other?	What services require bkg ck?	Do regulations specify which direct care workers required to have bkg ck?	Do regs identify disqualifying events/violations that bar emp?	Cost of bkg check?	Who pays for bkg check?	Who completes bkg check verification?	Does state provide appeals process?	Will state provide confirmation of bkg check completed w/in past year?
Delaware Ken Thompson Delaware Health & Social Services, Div of LTC 302-577-7295 X244 Kenneth.E.Thompson@state.de.us	Yes, state law and rule http://delcode.delaware.gov/title16/c011/sc04/index.shtml#TopOfPage	FP, FBI, & state bkg ck	LTC, ALF, HHA, grp homes & those under contract to provide srvs	Yes, all applicants for employment in named facilities	Yes http://regulations.delaware.gov/AdminCode/title16/3000/3105.shtml#TopOfPage	\$69 total - \$24 FBI & \$45 to state	State pays first FP ck for LTC & HHA; after that, emp or applicant pays; all temp agencies resp for fee	Law enforcement	No, unless applicant can prove state in error	No, only for employers in DE
Florida Cara Lee Starnes Agency for Health Care Administration, Bureau of LTC Services 850-410-3400 starnesc@ahca.myflorida.com	Yes, state law http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&URL=Ch0435/titl0435.htm&StatuteYear=2007&Title=%2D%3E2007%2D%3EChapter%20435	Level 1: FL Dept of Law Enforcement, name, SSN & DOB; Level 2: inclu Lev 1 plus FP & FBI ck	LTC, ALF, HHA, HOS, HPC, hlth care clinics, nurse registries, ICF/DD & hm med equip http://ahca.myflorida.com/MCHQ/Long_Term_Care/Background_Screening/BGS%20Who%20is%20required%20to%20be%20screened.pdf	Yes Statute for ea provider type specifies which pos undergo bk ck http://ahca.myflorida.com/MCHQ/Long_Term_Care/Background_Screening/BGS%20Who%20is%20required%20to%20be%20screened.pdf	Yes http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&URL=Ch0435/titl0435.htm&StatuteYear=2007&Title=%2D%3E2007%2D%3EChapter%20435,Sec.03 & .04	Level 1 \$23; Level 2 \$47	Usually facility pays	FL Dept of Law Enforcement	Yes	Yes
Georgia Kris Adams Dept of Human Resources 404-657-1511 kaadams@dhr.state.ga.us	Yes, state law OCGA 31-7-250 & 260 <u>Link to search statutes:</u> http://www.lexis-nexis.com/hottopics/gacode/default.asp	Name, SSN, DOB, FP & FBI http://ors.dhr.georgia.gov/portal/site/DHR-ORS/menuitem.a7e86d3fa49a7a608e738510da1010a0/?vgnextoid=0dfe44c26e5fff00VgnVCM100000bf01010aRCRD	LTC, personal care hms & private home care providers	Yes, directors, owners & mgrs of personal care hms req to have FP ck; private hm care providers or owners req to have FP ck; nursing hm & per care hm employees obtain name ck locally	Yes, OCGA 31-7-250 & 49-2-14.1	Total \$24	Health care worker	GA Bur of Investigation (GBI) and the FBI	Yes	Yes
Hawaii Terri Byers Dept of Health 808-262-7294 terri.byers@doh.hawaii.gov	Yes, state law. Rules not yet developed http://www.capitol.hawaii.gov/session2006/bills/GM750_.PDF	Name, SSN, DOB, FP & gender	LTC, ALF, retmt hms, HHA, intermed care fac, adult res care hms, expanded adult res care hms, spec treat fac, therapeutic liv prog, IDFDD, rural hlth ctrs & rehab agencies, apps for licensure, fac oper & volunteers	Yes, persons providing care or having access to residents	Yes, rule will be more specific	Not identified	Health care worker	Not identified	Yes	Not identified

State Survey - Criminal Background Check

State Contact Info	Are there requirements under state law, admin rules or procedure?	Is criminal background ck: Named based, SSN ID, DOB, FP, FBI, other?	What services require bkg ck?	Do regulations specify which direct care workers required to have bkg ck?	Do regs identify disqualifying events/violations that bar emp?	Cost of bkg check?	Who pays for bkg check?	Who completes bkg check verification?	Does state provide appeals process?	Will state provide confirmation of bkg check completed w/in past year?
Idaho (CMS Pilot Prog) Sue Altman Dept Health & Welfare Criminal History Unit 208-332-7997 altmans@DHW.Idaho.gov	Yes, state law and rule http://adm.idaho.gov/adminrules/rules/idapa16/0505.pdf http://adm.idaho.gov/adminrules/rules/idapa16/0506.pdf Idaho Statute 56-1004A	FP, FBI, & ID State Police	LTC, personal care facility, med & non med home community based services, residential care settings, state mental hosp, DD facility & vets home. List of all provider types in IDAPA 16.05.06. http://adm.idaho.gov/adminrules/rules/idapa16/0506.pdf	Yes, CNA, nurses, but depends on employee's access to resident -- each facility decides if worker has access.	Yes http://adm.idaho.gov/adminrules/rules/idapa16/0506.pdf , Sec 210	FP ck \$48. Includes: ID State Police \$10, FBI \$24, Criminal History Unit \$14	Applicant, but sometimes facility pays	DHW, Criminal History Unit	Yes	Yes
Illinois (CMS Pilot Prog) Jonna Veach Furlich IL Dept of Public Health 217-785-9165 jonna.furlich@illinois.gov	Yes, laws & rules http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1303&ChapAct=225%26nbsp%3BILCS%26nbsp%3B46%2F&ChapterID=24&ChapterName=PROFESSIONS+AND+OCCUPATIONS&ActName=Health+Care+Worker+Background+Check+Act%2E Amended law not in effect until new rules in place http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0120 http://www.ilga.gov/commission/jcar/admincode/077/07700955sections.html	Currently named based; FP when new rules in place	LTC, ALF, HHA, HOS, HPC & any owner or licensee def as healthcare employer	Yes For healthcare employer (other than LTC) it is non-licensed dir care wkr; For LTC, it is non-licensed access wkr	Yes http://www.ilga.gov/commission/jcar/admincode/077/07700955001600R.html	Name based \$16; FP \$15 +Livescan vendor chg	Health care provider pays for CNA, but other fac types can share cost with emp	IL State Police	Yes	Yes
Indiana Debbie Beers IN State Dept of Health 317-233-7067 dbeers@isdh.in.gov	Yes, law and rules http://www.in.gov/legislative/ic/code/title16/ar28/ch13.html http://www.in.gov/legislative/iac/T04100/A00162.PDF ?, Sec 14 (pg 38)	Limited criminal history ck is name and SSN; juvenile FP ck	LTC, ASC, HHA, HOS & HPC	Yes, nurse aide and other unlicensed employees	Yes IC 16-28-13-3	Contact does not know since done by state police or private company	Provider and applicant IC 16-28-13-6	IN State Police or private sources allowed to use local police	No	No

State Survey - Criminal Background Checks

State Contact Info	Are there requirements under state law, admin rules or procedure?	Is criminal background ck: Named based, SSN ID, DOB, FP, FBI, other?	What services require bkg ck?	Do regulations specify which direct care workers required to have bkg ck?	Do regs identify disqualifying events/violations that bar emp?	Cost of bkg check?	Who pays for bkg check?	Who completes bkg check verification?	Does state provide appeals process?	Will state provide confirmation of bkg check completed w/in past year?
Iowa Greg DeMoss Direct Care Worker Registry, Dept of Inspections & Appeals, Div of Health Fac 515-281-4077 Greg.DeMoss@DIA.iowa.gov	Yes, code IAC 441-81.1(249A) & 481-58.1(135C) http://www.legis.state.ia.us/Rules/Current/iac/481iac/48158/48158pp1.pdf	SSN and review other state registries if emp from another state	LTC & any facility that employs CNAs	Yes, CNAs only. Task force developing new criteria for other job classifications	Yes, see quest 1	SSN, \$12	Health care provider	Dept of Public Safety. LTC fac req to ck Central Abuse Registry which includes: Dependent Adult Abuse Reg, Sex Offender Reg & Child Abuse Reg	Yes, can req waiver from DHS	No
Kansas Ms. Sarita Everett KS Dept Health & Environment 785-296-6958 sarita.everett@kdhe.state.ks.us	Yes, state law http://www.kslegislature.org/legsrv-statutes/getStatuteInfo.do , KSA-39-970 & 65-5117	Name, SSN, DOB & gender	LTC, ALF, HHA, HPC, ADC, & staffing agencies	Yes Anyone w/dir care contact and/or all non-licensed emp; RNs & LPNs checked by professional brd	Yes http://www.kdheks.gov/hoc/ach_adm_resouces/cbc/offenses.pdf Prohibitions can be perm or 5 yrs	Name based \$10	Health care provider	KS Bureau of Investigation	No Prohibitions can be removed by order of expungement or docs showing 5 yrs since fulfilling sentence reqs	Yes http://www.kdheks.gov/hoc/disclaimer.html www.ksnurseaidregistry.org Results mailed out on indiv who have criminal history
Kentucky Pat True Office of Inspector General 502-564-7963 X3290 patricia.true@ky.gov	Yes, state law http://www.lrc.ky.gov/KRS/216-00/CHAPTER.HTM	Facilities ck with Justice & Public Safety Cabinet	LTC, ALF, HHA, nursing pools & family care homes	Yes, those providing direct services to a resident or client	Yes http://www.lrc.ky.gov/KRS/216-00/532.PDF http://www.lrc.ky.gov/KRS/216-00/533.PDF http://www.lrc.ky.gov/KRS/216-00/789.PDF	Contact does not know, since facility pays. Believes fee about \$5	Health care provider	Justice & Public Safety Cabinet	No	No
Louisiana Carolyn Dell (LTC) Dept of Health & Hospitals 225-342-1997 cdell@dhh.la.gov Yvonne Stewart (Adult Res) Dept of Social Services Bureau of Residential Licensing 225-342-9471 ystewart@dss.state.la.us Marian Tate (HHA & HPC) Dept of Health & Hospitals 225-342-6446 mtate@dhh.la.gov	Yes, state law & regs http://www.legis.state.la.us/lss/lss.asp?doc=97355 http://www.legis.state.la.us/lss/lss.asp?doc=97356 http://www.dss.state.la.us/Documents/OS/AdultResidential.pdf , pg 17  document.pdf	Name; FP if need more info	LTC, HPC, adult res care hm, ADC, HHA, HPC & personal care attendant providers	Yes, any unlicensed personnel who provide dir care	Yes http://www.legis.state.la.us/lss/lss.asp?doc=97356	State bkg ck \$26, FBI additional \$24	Health care provider	LA State Police or an authorized agent of state police http://www.lsp.org/who_support.html#criminal	No	Yes, LA State Police

State Survey - Criminal Background Check

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Maine Catherine Valcourt Dept of Health & Human Servs 207-287-2974 catherine.valcourt@maine.gov	Yes, law & rules Personal Care http://janus.state.me.us/egis/statutes/22/title22sec1717.html HHA http://janus.state.me.us/egis/statutes/22/title22sec2149-a.html ADC http://janus.state.me.us/egis/statutes/22/title22sec8606.html Assisted housing prog http://janus.state.me.us/egis/statutes/22/title22sec7851.html	Name, SSN & ck of neighboring states – VT & NH	Personal care agencies, HHA, res care, temp agencies & ADC	Yes, CNAs & unlicensed assistive personnel	Yes Personal Care http://janus.state.me.us/egis/statutes/22/title22sec1717.html , Sec 3 HHA http://janus.state.me.us/egis/statutes/22/title22sec2149-a.html , Sec 2 ADC http://janus.state.me.us/egis/statutes/22/title22sec8606.html , Sec 1 Assisted housing prog http://janus.state.me.us/egis/statutes/22/title22sec7851.html , Sec 4	\$25 for name & SSN	Health care provider or emp agency	State Bureau of Identification	Yes	Yes, CNA only
Maryland Margie Heald Dept of Health & Mental Hygiene 410-402-8101 mheald@dnhm.state.md.us	Yes, state law §19-1901	Apply for state crim history records ck or req pri agcy ck of ea state in which fac knows or has reason to know emp worked or resided in past 7 yrs	LTC, ADC, HPC, ALF & HHA	Yes, employee who has routine and dir access to dependent adults	Yes §19-1909	\$70-\$90 for FP	Health care provider	Law enforcement or pri agency	Yes §19-1908	No
Massachusetts Sherman Lohnes Dept of Public Health 617-753-8160 sherman.lohnes@state.ma.us	Yes, regs http://www.mass.gov/Eeohhs2/docs/dph/regs/105cmr155.pdf , Sec 010(G)(3)	Name & SSN, ck of state criminal hist sys brd	LTC, rest hms, HHA, res care, HPC, homemaker servs	No, by facility type and dir access to residents	Yes http://www.mass.gov/Eeohhs2/docs/dph/regs/105cmr155.pdf , Sec .011	Name & DOB \$15	Health care provider	Exec Off of Pub Safety	No Would need to appeal to hiring facility	No

State Survey - Criminal Background Checks

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Michigan (CMS Pilot Prog) Toni Dennis Dept of Community Health dennist@michigan.gov	Yes, state law http://www.miltcpartnership.org/MainSite/W1.aspx , Public Acts 26-29	All available registries are checked first (Public Sex Offender, Office Inspector General, Offender Tracking Info Sys (OTIS), ICHAT an internet named base access tool, and Nurse Aid Registry) for no exclusionary findings before doing FP check	LTC, county medical care fac, HPC, HOS that provides swing bed services, home for the aged, HHA, psychiatric facility, ICFMR, and AFH	Yes, an individual who regularly has direct access to or provides direct services to patients or residents in the health facility. "Direct access" means access to a patient or resident or to a patient's or resident's property, financial information, medical records, treatment information, or any other identifying information	Yes http://www.miltcpartnership.org/MainSite/W1.aspx , Public Act 28, Sec 20173a(1)(b)	\$70 fee pd by CMS grant	No chg during pilot. Grant ends 9/07. Portion reimbursable to dept or provider by CMS	Provider cks registries, MI State Police run FPs through auto FP ID sys (AFIS) and forwards digital FPs to FBI, and state agencies (Depts of Community Health and Human Servs) rev "rap sheet," if record, and makes emp decision	Yes	Yes Name search by facility type. Going to centralized registry system
Minnesota Roger Golden Dept of Human Services 651-297-7014 roger.golden@state.mn.us	Yes, law http://www.revisor.leg.state.mn.us/bin/getpub.php?pubtype=STAT_CHAP&year=current&chapter=245c	Instate: name & DOB & may use DL# and/or SSN. FP ck if out of state or further pertinent info needed	LTC ALF, HHA, HOS, HPC, pers care prov organizations, supplement nursing agencies & licensed progs defined in law	Yes, Current or prospective empl/volunteers w/dir contact w/person srved by fac, agency or prog	Yes http://www.revisor.leg.state.mn.us/bin/getpub.php?pubtype=STAT_CHAP&year=current&chapter=245c#stat.245C.15.0	No chg for licensed progs, \$20 for unlicensed program	Health care provider	Commissioner of Dept of Human Services	Yes http://www.revisor.leg.state.mn.us/bin/getpub.php?pubtype=STAT_CHAP&year=current&chapter=245c#stat.245C.23.0	No
Mississippi Dina Russell MS Dept of Health dina.russell@msdh.state.ms.us	Yes, laws and regulations http://billstatus.ls.state.ms.us/documents/2003/html/HB/1000-1099/HB1077SG.htm http://www.msdh.state.ms.us/msdhsite/_static/30,0,83,60.html	FP ck by Mississippi Criminal Information Center (MCIC) & FBI	HOS, nursing home, pers care hm, HHA or HPC	Yes, any indiv empl of licen entity inclu any indiv who by contract prov patients, residents or clients dir, hands-on, medical care in patient's, resident's or client's rm or in treatmt or recovery rms	Yes http://billstatus.ls.state.ms.us/documents/2003/html/HB/1000-1099/HB1077SG.htm , Sec (5)(d)	\$50 per card	Up to facility	FPs done by either law enfmnt or fac and card sent to DoH and FPs sent to MCIC/FBI	No, any appeal is made to the hlth care fac On-line affidavit http://www.msdh.state.ms.us/msdhsite/_static/30,0,206.html	Yes, can tell if bkg ck done but cannot release results
Missouri Rick Jury Dept of Health & Senior Services 573-526-8532 rick.jury@dhss.mo.gov	Yes, state law and rules http://www.moga.mo.gov/statutes/c600-699/6600000317.htm http://www.sos.mo.gov/adrules/csr/current/19csr/19c30-85.pdf http://www.sos.mo.gov/adrules/csr/current/19csr/19c30-86.pdf	Name, SSN, DOB	LTC, HOS, HHA, in-hm serv & consumer dir serv vendor providers under contract w/DHSS, HPCs, or ADC	Yes Any person who has contact with patient or resident	Yes http://www.moga.mo.gov/statutes/c600-699/6600000317.htm , Sec 6	Varies: \$5 indiv, \$10 employer, \$20 for agency to ck	Health care worker	MO State Hwy Patrol	Yes http://www.dhss.mo.gov/goodcausewaiver/	No, but ind can ck Family Care Registry http://www.dhss.mo.gov/FC SR/

State Survey - Criminal Background Check

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Montana	No									
Nebraska Helen Meeks NE Dept Health & Human Services, Licensure Unit 402-471-0179 helen.meeks@hhs.ne.gov	Yes Under health care facility licensure requirements http://www.dhhs.ne.gov/reg/t175.htm	NE doesn't operate crim bkg ck prog. Facilities must complete crim bkg cks on unlicensed dir care staff through gov law enf agy or priv vendor that maintains crim bkg info and/or search NE registries for no adverse findings	LTC, ALF, HOS, ICF/MR	Yes See resp 2 & 6	No	\$38 for initial license to practice a profession auth to prescribe controlled substances as determined by dept shall be subj to crim bkg ck	Unknown	Facility or NE State Patrol for professional license	No	No
Nevada (CMS Pilot Prog) Ms. Kerry McKinney NV State Health Division Bureau of Licensure & Certification 775-687-4475 x252 kmckinney@health.nv.gov	Yes, state law NRS 449.176-188 http://leg.state.nv.us/NRS/NRS-449.html#NRS449Sec176	FP, FBI & NV criminal history record	Covered facilities defined in NRS. Include: LTC, ALF, landlord at senior housing for aged >55, med & non med home community based services, intermed care for IDD & post op, & residential grp homes >2 beds	Yes, all paid workers & independent contractors working at covered facility type are screened	Yes NRS 449.188 http://leg.state.nv.us/NRS/NRS-449.html#NRS449Sec188	\$21 state criminal FP ck, \$24 FBI FP ck, \$8-20 law enformt or 3 rd party commercial for fgrprt card. Effective 10/07: \$19.25 FBI electronic submission or \$30.25 printed card submission, other chgs same	Employer or applicant may share cost. State law allows applicant to be chged ½ the fee	Dept of Public Safety -- State Police	No Allow applicant to challenge results if present evidence results are inaccurate (eg, court documents)	No Can't keep civil records beyond 6 mos
New Hampshire Robert Ehlers Dept Health & Human Servs Health Facilities Administration 603-271-4967 rehlers@dhhs.state.nh.us	Yes, law http://www.gencourt.state.nh.us/rsa/html/XI/151/151-2-d.htm http://www.gencourt.state.nh.us/rsa/html/XI/151/151-3-c.htm http://www.gencourt.state.nh.us/rsa/html/XXX/326-B/326-B-15.htm	Currently: Name, SSN & DOB; Effective 9/1/07, FP ck	LTC, ALF, HHA, HPC	Yes, by license: RN, LPN, licensed nursing assistant, home health aid	Discretionary. Statute reads: "facility shall review the results of the criminal conviction record check before making a final offer of employment"	\$15. Form asks for name, DOB, driver's license # http://www.nh.gov/safety/divisions/nhsp/ssb/crimrecords/documents/dssp256.pdf	Health care worker	Div of State Police	Yes	No

State Survey - Criminal Background Checks

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New Jersey Ray Sweeney Dept of Health & Senior Services 609-292-4247 raymond.sweeney@doh.state.nj.us	Yes, rules http://www.state.nj.us/health/healthfacilities/documents/ltr/regnjac839.pdf , sub chpt 9.3(b), pg 33 http://www.state.nj.us/health/healthfacilities/documents/ltr/regnjac836.pdf	Not prescribed, fac may use commercial service or state police	LTC, ALF, ADC & adult fam care hms	Yes, ADC – owner & admin; cert medication aide, hmkpr hlth aide, nurse aide, pers care assist and/or cert assist liv admin All prof hlth care licensees bkg ck through prof & occup licen brd	Yes, facility has broad discretion	Contact did not know cost, but depends on how bkg ck done – whether commercial company or state police	Not regulated by dept -- can be provider or health care worker	Div of State Police & FBI	No	Yes, but cannot disclose results of bkg ck
New Mexico (CMS Pilot Prog) Santiago Sandoval Dept of Health, Div of Health Improvement 505-476-0800 santiago.sandoval@state.nm.us	Yes, state law and admin rule Sec 29-17-2 through 29-27-5, NMSA and 7.1.9 NMAC http://www.nmcpr.state.nm.us/nmac/parts/title07/07.001.0009.htm	FP	LTC, gen acute care, ALF, retirement home, HHA, or any facility that receives Medicare/Medicaid. Refer to 7.1.9.7.E NMAC for the complete list of servs	Yes, any person whose emp or contractual serv w/care provider includes dir care or routine and unsupervised physical or financial access to recipient. Licensed profs (e.g., RN, PT, physician, etc) excluded under “hosp caregiver” def which applies to gen acute care	Yes http://www.nmcpr.state.nm.us/nmac/parts/title07/07.001.0009.htm , Sec J	FP ck: \$65 full nationwide and statewide ck; \$20 modified statewide ck only. If applicant had full ck w/in 12 mos and chgs emp, only modified ck	Health care provider	Dept of Health, Criminal Hist Screening Prog	Yes	Yes
New York Mary Ann Monaco NY State Dept of Health 518-408-1272 mxm13@health.state.ny.us	Yes, law and rules http://www.health.state.ny.us/nysdoh/phforum/ny_crr10.htm , Volume C Part 402 http://www.health.state.ny.us/professionals/nursing_home_administrator/docs/dal_06-12_new_chrc_program_implementation.pdf	FP, name, DOB & some physical characteristics also collected	LTC, HHA & state licensed home care agencies	Yes, any person employed or used by nursing hm/home care agcy to provide dir care or supervision to patients	Yes, rap sheet reviewed by state legal staff; discretionary consideration given for rehabilitation	State ck \$75; FBI \$19.25 per print, electronically	Health care provider	NY State Div Criminal Justice Services	Yes, indiv has 30 days	Yes, no info on results


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North Carolina Jesse Goodman Dept of Health Service Regulation 919-855-3988 jesse.goodman@NCmail.net	Yes, state law http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_131D/GS_131D-40.html http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_131E/GS_131E-265.html	State criminal records ck named based; State Bureau Investigation fgprpt – req for applicants in state for >5 yrs	LTC, ALF, HHA & mental health	Yes, anyone w/out occupational license and has dir access to patient	No, the fact of conviction of a relevant offense alone shall not be a bar to employment. See statutes identified in quest 1	Varies by who does ck -- not regulated by state	Usually health care provider	Private entities can purchase Administrative Office of Courts' records or State Bur of Investigation	No	No
North Dakota Ohio Jayson Rogers Dept of Health 614-466-4627 jayson.rogers@odh.ohio.gov	No Yes, state law and code http://codes.ohio.gov/orc/109.572 http://codes.ohio.gov/oac/3701-13 OAC 3701-60 (HHA)	FP	LTC, dir care provider, ALF, ADC, county hm, HHA, HPC, cert portion of HOS	Yes Anyone who provides dir care to an older adult or group of older adults	Yes http://codes.ohio.gov/oac/3701-13-05	\$40: incl \$24 OH ck & \$16 FBI	Health care provider and applicant	Attorney Gen, Bur of Criminal Identification	No, but fac may hire applicant pursuant to 3701-13-06 pers char stand http://codes.ohio.gov/oac/3701-13-06	No
Oklahoma Dorya Huser (LTC) Dept of Health 405-271-6868 doryah@health.ok.gov Tom Welin (HHA & HPC) Dept of Health 405-271-6567 tomw@health.ok.gov	Yes, state law (LTC) http://www.health.state.ok.us/program/conddiv/675act.pdf , pg 63 (HHA) http://www.health.state.ok.us/program/medfac/HomeCareAct.pdf_pg_3	Name based	LTC, HHA & HPC	Yes, (LTC) all current emp and applicants; home health aides required to be certified, on registry & bkg cks	(LTC) Yes http://www.health.state.ok.us/program/conddiv/675act.pdf , pg 68 (HHA & HPC) No, references in statutes are not specific	Name based \$15	No req as to who pays	OK Bur of Investigation	No	No
Oregon Wendy Heckman Dept of Human Services Criminal Records Unit 503-378-5629 wendy.e.heckman@state.or.us	Yes http://www.oregon.gov/DHS/admin/crim_checks/410_007.pdf http://www.oregon.gov/DHS/admin/crim_checks/index.shtml	Search: name, SSN, DOB in-state only; various state registries; if applicant self discloses or indicates out-of-state res or identity in question, then FBI ck	LTC (Medicare certified), ALF, HHA, respite, mental hlth or DD	Yes Anyone who has dir contact w/patient, licensed/certified, registered or regulated by DHS http://www.oregon.gov/DHS/admin/crim_checks/index.shtml#who	Yes http://www.oregon.gov/DHS/admin/crim_checks/410_007.pdf , Sec 0280	\$12 sr facility fee	Facility pays FP fee	State licensing agency	Yes	Yes

State Survey - Criminal Background Checks

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Pennsylvania Trudy Schell PA Dept of Aging 717-265-7887 trsshell@state.pa.us	Yes, state law http://www.aging.state.pa.us/psolinettraining/cwp/view.asp?a=3&Q=244387	FP, FBI, state police	LTC, domiciliary care hms, HHA, ADC, pers care hms, HPC, comm res rehab srvs comm hms for indiv w/mr, fam liv hms, and state hosp	Yes, all applicants, admins, and any operators who have or may have direct contact with a recipient	Yes http://www.aging.state.pa.us/psolinettraining/cwp/view.asp?a=3&Q=242763	Currently FBI \$24; eff 9/15/07 FBI \$30.25	Health care provider	PA State Police	Yes	Yes
Rhode Island Adele Renzulli RI Dept of Health 401-222-4536 adele.renzulli@health.ri.gov	Yes, state law http://www.rilin.state.ri.us/statutes/title23/23%2D17/23-17-34.HTM	Statewide ck only, no FP ck	LTC, ALF, HHA, HPC & HOS	Yes, all dir care staff, new hires must be ck by end 1st wk of emp	Yes http://www.rilin.state.ri.us/statutes/title23/23%2D17/23-17-37.HTM	If done by local police no chg; \$5 if attn gen's office does ck	Health care provider	Law enforcement	No for felonies; at fac discretion to hire for misdemeanor s	No, would have to contact previous emp
South Carolina Kelly Barrett Dept of Health & Environmental Control 803-545-4049 barretkl@dhec.sc.gov	Yes, Code of Regulations §44-7-2910 http://www.scstatehouse.net/code/t44c007.htm http://www.scdhec.gov/health/licen/hlcbrc3.pdf#xml=http://www.scdhec.gov/cgi-bin/texis.exe/Webinator/search/xml.txt?query=44-7-2910&pr=www&prox=page&rorder=750&rprox=750&rdfreq=250&rwfreq=500&rlead=1000&sufs=1&order=r&cq=&id=46daaab41f http://www.scdhec.gov/health/licen/memo1g.htm	Mandatory 1st state FP ck; 2nd FBI if res <12 mos	LTC, ADC, HHA, & comm res	Yes, RN, LPN, CNA, volunteers, or any licensed prof emp by or contracting with a dir care entity who pro dir care or servs. Students exempt	Yes Comm res http://www.scdhec.gov/administration/regs/docs/61-84.pdf , pg 15 HHA http://www.scdhec.gov/administration/regs/docs/61-77.pdf , pg 13	State \$25; FBI \$32.25 & volunteer \$15.25 10/1/07	Health care worker	State Law Enforcement Div or priv bus which conducts bkg cks if utilizes current crim records from State Law Enf Div or FBI to determine crim record	No	No, would have to contact former employer
South Dakota	No									
Tennessee Carol Kennedy Dept of Health 615-253-5515 carol.kennedy@state.tn.us	Yes, state law (not codified yet) http://tennessee.gov/sos/acts/105/pub/pc0182.pdf	Name, SSN, DOB & FP	Only new licensees: LTC, ALF & HHA	Yes, anyone in health care field	Yes, determined by professional licensing brds	\$48 FP crd; \$56 electronic FP ck TN Bur Investigation & FBI	Health care worker, may be shared with employer	TBI & FBI	Professional brd would make this determination	No, would have to contact prof brd

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Texas Bevo Morris Dept of Aging & Disability Servs 512-4382363 bevo.morris@dads.state.tx.us	Yes state law http://tlo2.tlc.state.tx.us/statutes/hs.toc.htm , chpt 250	Name, race , sex & any identifying # for person	LTC, ALF, HHA, ADC, ICF/MR & HPC	Yes, anyone with dir contact w/ resident or client	Yes http://tlo2.tlc.state.tx.us/statutes/hs.toc.htm , chht 250.006	Name based \$10; FP \$15	Health care provider	Law enforcement	No	No
Utah Donna Riley Dept of Health, HSLHF 801-538-9287 driley@utah.gov	Yes, law & code http://le.utah.gov/~code/TITLE26/htm/26_14012.htm http://www.rules.utah.gov/publicat/code/r432/r432-035.htm	Ck of state registries name based; if lived in state <5yrs, FBI FP ck	LTC, HHA, HPC, ALF, sm hlth care fac, & ERD	Yes, each fac admin is resp to define what pos provide dir care	Yes http://www.rules.utah.gov/publicat/code/r432/r432-035.htm#T5	FBI \$24 per person, local clearance ck incl in licensing fee	Health care provider. FBI fees covered by either the provider or applicant at provider's discretion	State licensing/certification agency	Yes	Yes
Vermont Lorraine Wargo Dept of Disabilities, Aging & Independent Living 802-241-3186 lorraine.wargo@dail.state.vt.us	No law, agency procedures http://dail.vermont.gov/dail-policies/policies-documents/dail-background-check-policy-april-2006	Name and SSN. Ck Adult Abuse Registry, VT Crime Info Ctr & motor veh record for volunteers & those who transport people	ADC, attendant servs, waiver servs, DD, HHA & trauma brain injury waiver services	Yes, anyone who provides care or manages funds on behalf of person receiving servs	Yes, Sec VIII-C	\$5.00	Employer	Hiring facility	No, variance process	No
Virginia Carrie Eddy (LTC, HHA & HPC) Dept of Health 804-527-4502 carrie.eddy@vdh.virginia.gov David Stasko (Home-based Care Providers) Dept of Social Services 540-347-6313 david.stasko@dss.virginia.gov Judy McGreal (ALF & ADC) Dept of Social Services 804-726-7157 judith.mcgregal@dss.virginia.gov	Yes, state law and regulation (LTC) http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+32.1-126.01 (HHA & HPC) http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+32.1-162.9C1 (Home-based Care) http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1601.1 (ALF & ADC) http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1720 & 1721 http://leg1.state.va.us/000/reg/TOC22040.HTM#C0090	Name based, DOB, SSN & some phy characterizes	LTC, ALF, HPC, HHA, agency approved providers (companion, chore, homemaker servs) AFH & ADC	Yes, (LTC, HHA & HPC) any compensated employee; (AFH) provider & assistant and any other household members who have contact w/client; (ALF & ADC) any compensated employee; (ALF) any licensee	Yes  barrier crimes guide.pdf http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1719	Name based \$15	Health care provider; (Home-based Care Providers) paid by local Dept of Social Services; ALF & ADC not specific who pays for ck	VA State Police	Only if criminal record received by licensed provider is incorrect	No, would have to contact state police http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+19.2-389

State Survey - Criminal Background Checks

State Contact Info	Are there requirements under state law, admin rules or procedure?	Is criminal background ck: Named based, SSN ID, DOB, FP, FBI, other?	What services require bkg ck?	Do regulations specify which direct care workers required to have bkg ck?	Do regs identify disqualifying events/violations that bar emp?	Cost of bkg check?	Who pays for bkg check?	Who completes bkg check verification?	Does state provide appeals process?	Will state provide confirmation of bkg check completed w/in past year?
Washington Lamona Foster Dept of Social & Health Servs, Background Check Central Unit 360-902-7823 fostelj@dshs.wa.gov	Yes, state law http://apps.leg.wa.gov/RCW/default.aspx?cite=43.43.830 http://apps.leg.wa.gov/RCW/default.aspx?cite=43.43.842 , Sec 1,2,5,17 & 18 http://apps.leg.wa.gov/RCW/default.aspx?cite=43.20A.710 , Sec 4	Named based and DOB for instate search for LTC, boarding home (ALF), and adult family home. For home & comm. based servs, an in-state name/DOB ck if applicant lived in state >3 yrs. FBI ck if applicant lived in state <3yrs. Also ck of local data bases for substantiated reports of abuse & neglect	LTC, boarding homes (ALF), and home & community based services	Yes, anyone w/unsupervised access to vulnerable adults RCW 43.20A.710, Sec 1c	Yes http://apps.leg.wa.gov/RCW/default.aspx?cite=43.43.830 , Sec 5 http://apps.leg.wa.gov/RCW/default.aspx?cite=43.43.842	No chg to applicant -- \$54 for FP based background ck -- \$24 FBI & \$30 WA print ck	State	DSHS	Yes	Subject of background check would need to submit a public disclosure request for DSHS to release the information
West Virginia John Wilkinson Dept of Health & Human Resources 304-558-0585 johnwilkinson@wvdhhr.org	Yes, rules http://www.wvdhhr.org/ohflac/Rules/default.htm	Specificity of criminal bkg ck different by fac type	LTC, ADC, HPC, HOS, ALF, Res Care Communities & Alzheimer's/Dementia Special Care Units	Varies: prof brds ck licence in good standing and non prof or dir care wkrs generally req crim bkg ck	Yes, varies by rule and fac type http://www.wvdhhr.org/ohflac/Rules/default.htm	FP ck \$10 & FBI \$25-30	Health care provider but cost may be passed on to employee	Law enforcement	Not specified in rules	No
Wisconsin (CMS Pilot Prog) Rebecca Swartz Office of Caregiver Quality, Division of Quality Assurance 608-264-6721 swartrj@dhfs.state.wi.us	Yes, state law http://www.legis.state.wi.us/rsb/code/hfs/hfs012.pdf	State named based	LTC, ALF, retirement homes, HHA, HPC	Yes, a person employed by or under contract who has regular or direct contact with clients or the personal property of the client and is under their control	Yes http://www.legis.state.wi.us/rsb/code/hfs/hfs012_app_a.pdf http://dhfs.wisconsin.gov/caregiver/pdf/files/Chap4-FindingsConvictns.pdf	Fee is dependent on type of agency	Health care provider	Provider. Provider pays fee to Dept of Justice to access their data base	Yes	No
Wyoming	No									

Acronyms

Adult Day Care	ADC
Adult Foster Care	AFH
Assisted Living Facility	ALF
Certified Nurse Aide	CNA
Date of Birth	DOB
End-Stage Renal Dialysis	
Facilities	ERD
Fingerprint	FP
Home Health Agency	HHA
Hospice	HPC
Intermediate Care Facility for	
the Developmentally Disabled	ICFDD
Intermediate Care Facility for	
the Mentally Retarded	ICFMR
Long Tern Care	LTC
Social Security Number	SSN

ATTORNEY GENERAL
STATE OF MONTANA

Mike McGrath
Attorney General



Department of Justice
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

MEMORANDUM

TO: Ali Bovington
FROM: Stuart Segrest
DATE: April 7, 2008
SUBJECT: Dissemination Limits of Criminal History Information
under NCPA/VCA

Issue I: Under the NCPA/VCA (the Act), may DPHHS or another governmental entity receive the criminal history record information?

Short answer: Yes.

Discussion:

Montana may designate DPHHS or another agency as the "authorized agency" under the Act. 42 U.S.C. § 5119c(1). The authorized agency "shall access and review" criminal history records through the national criminal history background check system. Montana may designate more than one agency as the authorized agency. 42 U.S.C. § 5119a(a)(2).

Even if DPHHS is not the designated authorized agency, the national criminal history may be shared w/ DPHHS via the "related agency" doctrine, which allows the exchange of the criminal record with other governmental agencies. 28 U.S.C. § 534(b). (See CJIS Information Letter 99-3 at 10.)

Issue II: Under the NCPA/VCA (the Act), may a nongovernmental qualified entity (the employer) receive the criminal history record information?

Short answer: Yes, with the individual's consent.

Discussion:

The Criminal Justice Information Services Division of the FBI (CJIS) sent out an information letter dated November 2, 2006 advising that the dissemination of an individual's criminal history to an employer "with the individual's consent and at his discretion is not legally objectionable under Federal law." The letter first states that the criminal background check may be authorized via state statute under Pub. L. 92-544, or via employer request. 42 U.S.C. § 5119a. An example is then given from Florida, where an individual's criminal history is disseminated to employer's at the individual's request.

The FBI has "no legal objection to the dissemination" of an individual's criminal history "at the consent of the individual, as the practice does not conflict with Federal law." Letter at 1. The letter cites, for this

TELEPHONE: (406) 444-2026 FAX: (406) 444-3549 E-MAIL: contactdoj@mt.gov



Attachment I
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Ali Bovington
April 7, 2008
Page 2

determination, to the fact that access to the criminal history cannot be withheld to the subject of the record, or "an authorized representative with the consent of the subject" under FOIA. (See the letter at fn. 5, citing Title 5, U.S.C. § 552a(d)(1) and (t)(1)).

The letter then lists certain "provisions" that states planning to disseminate criminal records to employers must incorporate. Letter at 1-2. Basically:

1. Employers must serve children, the elderly, or disabled persons.
2. They must execute a "user agreement" that sets out how the criminal background checks will be performed, including "security requirements."
3. The employer must obtain a **waiver** from the employee or volunteer subjected to the background check.
4. The waiver must include an "acknowledgment that [the employer] will perform an FBI criminal history records check and that the state is specifically authorized to disseminate the resulting [record], if any, to the [employer]."

Conclusion:

Under the Act, an employer may receive the criminal history record information of an individual if the individual provides consent via a waiver.



U.S. Department of Justice

Federal Bureau of Investigation

Criminal Justice Information
Services Division
Clarksburg, WV 26306
November 2, 2006

TO: ALL CJIS SYSTEMS OFFICERS AND STATE IDENTIFICATION BUREAU
REPRESENTATIVES

The purpose of this letter is to advise that the dissemination of an individual's criminal history record information (CHRI) to a nongovernmental entity (NGE) with the individual's consent and at his direction is not legally objectionable under Federal law.

The safety and well-being of children and other vulnerable individuals is a national priority. The National Child Protection Act (NCPA), as amended by the Volunteers for Children Act (VCA), encouraged states to authorize fingerprint-based national criminal history record information (CHRI) background checks of individuals having access to children and other vulnerable people, by enacting legislation under Public Law (Pub. L.) 92-544.¹ The NCPA/VCA also authorized entities in states without specific Pub. L. 92-544 legislation to obtain national CHRI background checks.² Recommended policies and procedures for implementation of the NCPA/VCA were previously set out by the FBI in the Criminal Justice Information Services (CJIS) Information Letter 99-3.³

The success of this national initiative of child protection is dependent on the cooperation by the states in the implementation of the NCPA/VCA and other federal and state legislation.⁴ Many states have established programs for conducting criminal history record background checks on individuals who work with children, the elderly, or the disabled. A successful example is the Volunteer & Employee Criminal History System (VECHS) program developed by the Florida Department of Law Enforcement (FDLE) using the basic framework of NCPA/VCA with the added feature of dissemination of an individual's CHRI to NGEs at his request. By establishing strict controls on the access and use of CHRI by entities enrolled in the VECHS program, the FDLE has created a program that facilitates the performance of criminal history record checks on thousands of individuals who work with children, the elderly, or individuals with disabilities.

As a result of the success of the VECHS program, the National Crime Prevention and Privacy Compact Council requested the FBI to provide advice on the dissemination under the NCPA/VCA of an individual's CHRI to an NGE with the individual's consent. The FBI has no legal objection to the dissemination of CHRI at the consent of the individual, as the practice does not conflict with Federal law.⁵ Other states planning to establish CHRI background check programs, that include the dissemination of CHRI to NGEs, must incorporate the following provisions. Since state laws vary widely, all agencies are advised to review any proposed programs with legal counsel.

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State Survey - Criminal Background Check

ALL CJIS SYSTEM OFFICERS AND STATE IDENTIFICATION BUREAU REPRESENTATIVES

The state shall establish procedures for program participation by NGEs which serve children, the elderly, or disabled persons. The NGEs must execute a user agreement that sets out the terms under which the criminal history record checks may be performed, including the security requirements for protection of the CHRI and the procedures for challenging the accuracy and completeness of the CHRI as entitled by the NCPA/VCA and 28 Code of Federal Regulation 50.12.⁶

The NGE shall obtain an executed consent form (waiver) from every employee or volunteer subjected to the criminal history record check. The NGE shall retain the original waiver and transmit a copy to the state. The terms of the waiver must include an acknowledgment that the NGE will perform an FBI criminal history records check and that the state is specifically authorized to disseminate the resulting CHRI, if any, to the NGE.⁷ The waiver may further authorize the NGE to provide the CHRI to another NGE. The NGE must maintain a record of any secondary dissemination of the CHRI.

For more information about the VECHS program, please contact the FDLE's User Services Bureau, VECHS Unit, at (850) 410-VECHS (8324) or log on the FDLE's website at www.FDLE.state.fl.us/BackgroundChecks. For more information about the NCPA/VCA, please contact Mr. Allen Wayne Nash, FBI, CJIS Division's Criminal Information & Transition Unit, at (304) 625-2738.

Sincerely yours,

David Cuthbertson
Section Chief

¹ See 42 U.S.C. § 5119a. The CHRI background checks under the NCPA/VCA determine whether the individual has been convicted of crimes that bear upon his fitness to have responsibility for the safety and well-being of children, the elderly or individuals with disabilities.

² 42 U.S.C. § 5119a(a)(1).

³ Contact the CJIS Divisions' Communications Unit at (304) 625-4995 for a copy of the CJIS Information Letter 99-3 (12/01/1999).

⁴ See e.g. The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003 (42 U.S.C. § 5119a note), as amended, and The Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248).

⁵ Access to CHRI by the subject of the record, or by an authorized representative with the consent of the subject, cannot be withheld under the Freedom of Information Act. See Title 5, U.S.C. § 552a(d)(1) and (t)(1).

⁶ An example of a legally sufficient UA under Florida law may be obtained from FDLE.

⁷ An example of a legally sufficient waiver under Florida law may be obtained from FDLE.

Requiring Criminal Background Checks for Volunteers

Pros and Cons

PROS

- Volunteers frequently work with vulnerable clients, patients, residents.
- Volunteers are frequently alone with vulnerable clients, patients, residents for extended periods of time.
- Volunteers may have access to financial information, checkbooks, cash cards, etc. of vulnerable clients, patients, residents.
- Volunteers often develop close relationships with vulnerable clients, patients, residents which may make exploitation easier.

CONS

- The cost of requiring criminal background checks for volunteers would be extensive
- Requiring criminal background checks might decrease volunteerism because some might be reluctant to subject themselves to this perceived invasive procedure for a volunteer position.
- Volunteers are often sporadic with their time meaning they might volunteer weekly for a month and then not again for six months.

State Survey - Criminal Background Check

SJ 7 Workgroup Meeting Minutes October 23-24, 2007

- I. Opening: Workgroup meeting convened at approximately 12:15. Jeff Buska welcomed the group and thanked them for their interest and participation on this workgroup. Introduced Director Joan Miles for opening comments. Director Joan Miles stated many people responded to the call for the work group. She said many people commented on the importance of this issue and the details of it that needed to be addressed. Joan thanked everyone for their interest, and identified this is a complex topic with many issues that will be addressed by the workgroup.
- II. Workgroup members were introduced and provided some background on their interest and involvement in the workgroup. Those in attendance included: Betty Beverly, Montana Senior Citizen's Association; Grace Bowman; Webb Brown, Montana Chamber of Commerce; Gayla Brown, MSN, RN, Elkhorn Health and Rehab; Jerry Daugett, Living Life (substituting for Kim); Tom Gregg, St Peters Hospital; George Groesbeck, AWARE; Mike Hanshew, Montana Health Solutions; Rose Hughes, MHCA; Stu Lekander, Easter Seals; Shirley Powell; Karolyne Redding, PHR, Waterford; Bob Ross, South Central Mental Health Center; Claudia Clifford, AARP (substituting for Al Ward); Jeff Buska, QAD; Jill Caldwell, QAD; Becky Fleming-Siebenaler, QAD.

Workgroup member absent: Casey Blumenthal, MHA. Webb Brown was absent October 24.

Interested Parties Present: Joan Miles, DPHHS; Laura Janes, Kendra Rose, Abby Hulme, Marilyn Kelly-Clark, Barb Swehla, Pat Bik, Steve Barr, Rick Norine.
- III. Review SJ 7 Resolution. Jeff began a discussion and review of the SJ7 resolution and asked Mike Hanshew to provide some background on the legislation. Mike worked with Senator Lind and others on the resolution and provided the workgroup with useful information on how the legislation was crafted that brought the workgroup together. Jeff said that our partners in this legislation are DOJ (Department of Justice), and we are also working with DLI (Department of Labor and Industry) and DOC (Department of Corrections) to coordinate efforts and resources.
- IV. The resolution has six points to be addressed by the workgroup. In this meeting, the workgroup will address the first two, which are: identifying programs and services and a definition of a direct care worker.

Jeff (QAD) introduced a proposed a timeline for subsequent workgroup sessions (copy attached). The goal is to have this process finalized in March 2008 and a draft report with recommendations prepared. The time between March and the next legislative session (January 2009) will be used to finalize the report and work on any

necessary language for legislation. The workgroup will identify information and work they would like addressed in addition to those outlined in the resolution.

- V. Jeff introduced the survey results the department prepared. (Copy of which was posted on the website and provided in advance of the meeting). The work group discussed the results from this survey of other states. The work group discussed and asked the department to prepare more detailed information, a side by side comparison of selected states. It was suggested by Tom Gregg that this was useful when he participated in a similar process in Minnesota. The workgroup discussed this and agreed on the following ten specific states: Alaska*, Arizona, Idaho*, Kansas, Minnesota, Nevada*, New Mexico*, Oregon, Oklahoma, and Washington. (starred states are part of the CMS pilot project).

Workgroup discussions included additional questions and a request to obtain more information from the surveyed states identified above, including: How often are background checks done? Do they have an exception for consumer directed care? Who gets the results? and who pays for the background check? Additional discussion on the survey results revealed additional questions and concerns that need to be addressed including: Are we going to tell businesses who they cannot hire? Who has the liability for not hiring (or hiring) somebody? The workgroup asked if we are expecting to put this into rules or statute. Are background checks transferable for a period of time? Can employees work pending a background check? Can employers grandfather in existing employees? If employers need to perform background checks on existing employees, will the results be treated the same? Who pays the cost of the background check? How long it takes to get a background check? What is the source of the background check? Is there a concern regarding identity theft?

Becky (QAD) clarified how the process works at Child Care Licensing (CCL). The employer learns that there is a disqualifying event, but not the details of the disqualifying event. Privacy concerns outweigh the public's right to know in this case. CCL does an FBI check for anyone living out of the state for the previous five years, other wise the background check is done through MT DOJ.

The workgroup will develop parameters on how the statute should look. The group discussed and agreed that the statute or rules should be uniform across DPHHS; different divisions of DPHHS should not have different statutes /rules /requirements. All vulnerable populations deserve the benefit of this legislation. The group's goal is to work on legislation that will get passed at the legislature, and not be too broad to cause it to fail.

- VI. Jeff introduced and identified the work the agency prepared on disqualifying events as identified in the State surveys. This was a one page table titled "Chart: Exclusionary criteria for the varying states" dated October 23, 2007. (Copy attached). The purpose of this chart is to introduce the topic for thought and consideration by the workgroup. This topic will be discussed in more detail at the

State Survey - Criminal Background Check

next meeting. The chart for the varying states was discussed briefly and the workgroup asked for more specific information on specific crimes and asked the department to prepare a comparison of a smaller group of states that have disqualifying events. In addition, the workgroup requested the department to prepare a proposal for their consideration and discussion of disqualifying events based upon Montana law.

Break

- VII. The next item on the agenda for consideration and discussion was to identify and define all programs or services funded or regulated by DPHHS where criminal background checks might be required. Jeff pointed to the language in line 24 and 25 of the resolution as broad language for the program and services that is provided, funded, or regulated by DPHHS. Recognizing the fact it is also associated with the term “direct-care staff person” which also needs to be defined. Jeff introduced an inventory by DPHHS division of all the programs or services that are provided, funded or regulated by DPHHS (copy attached). The workgroup proceeded to review this handout to identify the programs and services they believe were intended to be covered by this project. The group began with the Quality Assurance Division and decided that a list of those services which would be excluded would be easier to devise than a list of which services would be included. That list was discussed at length, although agreement was reached to exclude some services. A summary will be reviewed at the next work group meeting.

The group discussed types of facilities and classifications of staff in those facilities that might need to have background checks. The group discussed the definition of facilities, direct care workers, and vulnerable populations. Jeff identified it was time for public comment and suggested the group continue the discussion later.

- VIII. Public Comment:
Marilyn Kelly-Clark, BLI – Talked about the concerns of the licensed programs. The Licensing boards attached to DLI already have the statutory authority to require background checks. Most have not taken advantage of this authority, but a few are considering it.
- IX. Summary and Adjourn

October 24, 2007

Workgroup meeting convened at approximately 8:15 am

- X. Discuss and Define Direct Care Worker. The workgroup continued the review of the DPHHS inventory and switched from identifying excluded services to those they intended to include in the background check requirement. The discussion included debates regarding who in which facilities would be defined as a direct care worker. The workgroup asked staff to provide definitions from other states. The group also requested information from the other states on how many background checks are

conducted and how many result in hits where a disqualifying event was identified. Discussion resulted in a realization that the programs and services are broad in DPHHS and a concern of the number of providers and people this will affect. The workgroup debated the likelihood of success of bill passing the legislature that was extremely broad in nature and covered all these program and services in DPHHS. The discussion included identifying the settings that may require background checks for all staff, as opposed to looking at just position titles. Settings that may require a background check included those with an assessment of risk where the children, aged, disabled, or mentally ill are vulnerable in a service setting such as the home or in custodial care, such as: residential service, Licensed health care facilities, Nursing homes, Assisted living facilities, Group homes, Residential treatment facilities, Day services (it is a form of custodial care), Hospitals.

The group worked on a draft of a working definition of a direct care access employee: Direct care access employee definition: an unlicensed person who works in private or licensed residential settings, licensed health care facilities, or day service programs that involve direct contact with a client, patient or resident. Department staff was assigned the task to work on this definition by comparing other states definitions and prepare proposal for review and discussion at the next meeting. The workgroup concluded the discussion and opened the meeting for public comment.

- XI. Public Comment. Marilyn Kelly-Clark, DLI. Wanted to clarify that for the Social Workers, background checks are a requirement of licensure, and the applicant pays the background check fee; the check is only done once.

Abby Hulme, SLTC. She asked that the work group think about the work force issues. Montana has a real shortage of workers, and most workers in these setting are less than full time employees.

Kelly Williams, SLTC, asked about who maintains background check records. DOJ clarified that DOJ does not maintain a central repository for finger print records that are not criminally related.

- XII. Summary. The workgroup will continue to work on definition of direct care worker, settings, and a licensed health care facility. The department will prepare additional survey information for the selected states and address the additional questions. In addition, the department will prepare additional information regarding disqualifying events and prepare a proposal for Montana based upon Montana laws.

The department will follow up on a request of the workgroup regarding statistics (if available) on how many disqualifying events are turned up in states that do background checks. The group also discussed that it would be helpful if it could be determine how many disqualifying events turn up in state only checks as compared to FBI fingerprint checks.

State Survey - Criminal Background Check

Next work group scheduled for December 4-5, 2007, in the Wilderness Room of the Colonial Building. The meeting will begin at 1:00 P.M.

XIII. Meeting adjourned.

SJ 7 Meeting
Meeting Minutes
December 4-5, 2007

Work Group members present: Jeff Buska, Jill Caldwell, Becky Fleming-Siebenaler, Grace Bowman, Betty Beverly, George Groesbeck, Gayla Brown, Webb Brown, Jerry Daugett, Shirley Powell, Bob Ross, Karolyne Redding, Casey Blumenthal, Mike Hanshew, Al Ward, (Claudia Clifford), Rose Hughes.

December 4, 2007

Welcome & Brief Summary of October meeting

Jeff Buska opened the meeting and briefly identified and discussed the handouts that were provided for the workgroup (copy attached). The handouts address the action items work DPHHS staff conducted as identified in the October meeting. Claudia Clifford also identified and distributed some handouts from AARP regarding national legislative proposals regarding criminal background checks. (copy attached).

Jeff said a draft of the October Meeting minutes was sent out for comment to the workgroup. He intended to provide the workgroup with the opportunity to review and comment before making them public on the website. Once comments are received he will make changes and finalize the minutes, then publish and post on the website. He asked if this was an acceptable process for the workgroup and received feedback that this was acceptable. Jeff reviewed the October meeting to do list regarding the definition of direct care access employee and identified the definition that the group worked on during the last meeting. Staff made some changes based upon the review of definitions in other states as requested and the proposed definition is in the handout. The handout also includes definitions for other key words and references that are used such as vulnerable person for consistency. He brought a clean copy of services that would be subject to background checks that were discussed at the October meeting and used this list to prepare the list of service settings as identified in the definition for licensed services. Jeff explained the different categories of licensure and references and indicated that the list of services is still very broad that would be subject to this criminal background check requirement. The workgroup agreed that the list is still very broad and discussion ensued regarding the viability of passing legislation for a criminal background check. Jeff made it clear that the goal for the group is to reach consensus where we can, but in the event that consensus is not possible, he suggested that we identify and report those issues in the report to the legislature. This will explain the issues as well as the pros and cons for consideration and discussion at the legislature.

The Workgroup was opened up to discussion of the draft definition of Direct Care Access Employee. The attached handouts were the basis of that discussion.

October definition: *Direct care access employee definition:* an unlicensed person who works in private or licensed residential settings, licensed health care facilities, or day service programs that involve direct contact with a client, patient or resident.

State Survey - Criminal Background Check

Revised definition for discussion: *Direct care access employee means an unlicensed person who works in an individual's private home, licensed residential settings, licensed health care facilities, or licensed child day care programs that involve direct contact through employment or contract with a vulnerable person. Such term does not include a volunteer unless the volunteer has duties that are equivalent to the duties of a direct care access employee through employment or contract and those duties involve (or may involve) one-on-one contact with a vulnerable person.*

A discussion ensued about private arrangements in facilities whose employees would otherwise be subjected to background checks. There was some concern about setting up a two-tiered employee system in facilities, one for licensed staff and one for non-licensed staff. There was also concern that legislation would be hard to pass if it restricted private arrangements. There was concern that the definition only referred to unlicensed persons, which eliminated nurses. Talked about direct care, that it is not occasional care but it is ongoing, routine care. The general consensus was that the definition needed to include all staff and eliminate the reference to unlicensed staff.

The workgroup then discussed the need to include child care in this report. The department already has the authority and a process that seems to be working. Several workgroup members questioned why we need to include this program in our discussions. A discussion ensued and reference was made back to the SJ7 legislation that included all programs provided, funded or regulated by the department. Based upon previous discussions regarding the scope of this project and the likelihood of passing legislation a suggestion was made to remove child care from this project. The majority of the discussions and topics of the workgroup are focused around the elderly, disabled, and the mentally ill. In addition, since the child care programs have a process and are not represented in the workgroup it was suggested to exclude them from this process. Discussion ensued and the workgroup reached consensus to remove child care licensing program requirements from this process entirely. The workgroup felt checks and process were in place and working for the DPHHS Child Care Licensing Program. That decision does not mean excluding group homes, or services for the DD.

The workgroup resumed discussion regarding the inclusion of volunteers in the definition. Consensus was not reached. This may be an issue for the legislature to resolve. Some group members stated that many volunteers are performing direct care for vulnerable persons. Other members believe any legislation including volunteers would be too hard to pass. Jeff said that he, Becky and Jill would work in the definition and the workgroup could revisit that in the morning, as it was time for the presentation by the Department of Justice (DOJ) on fingerprinting.

Fingerprint Based Background Check Presentation by Kristy Hartnett of the DOJ.
(the Power Point included in the handouts)

DOJ provides a service for \$10 name based checks that reviews information from Montana and 6 other states (AK, UT, WY, NV, OR, ID), Kristy indicated that WA will be added to this list. This grouping is called the WIN states, which stands for "Western

Identification Network". The name based information includes arrests, convictions, etc. but not different impositions. With fingerprint checks, there is complete information nationwide. It was made clear that once fingerprints are processed for the background checks, the fingerprints are disposed of. It normally takes 7-10 business days to process a check. Becky pointed out that for Child Care Licensing, 100% of fingerprints taken outside of law enforcement have failed and need to be redone. Kristy said that DOJ will train people on how to take fingerprints free of charge. DOJ plans to start certifying people to take fingerprints. There is a wide range of cost for obtaining fingerprints; the range is from \$5 at DOJ to \$50 in Canada. There is also a wide range of costs in equipment, from \$200 for the ink and a kit, up to \$45,000 for the live scan with digital imaging of fingerprints. A demonstration was done on a live scan fingerprint machine.

Discussion continued about having a clearinghouse for the background check information. The workgroup discussed that it would be either DPHHS or DOJ that would perform this activity. Kristy indicated that DOJ is looking at setting up a clearinghouse in response to the legislation related to the Adam Walsh Act. There was some suggestion that funding be attached to DPHHS for the administrative activities and be included in the executive budget, so a fiscal note would not be necessary for this legislation. Jeff indicated that it is an option to be considered and that the workgroup will have an opportunity to discuss administrative processes and funding. Discussion regarding the suggestion ensued and all generally agreed this would be a good idea.

Becky brought in a couple of printouts from the record checks conducted by the Child Care Licensing program with identifiers redacted so work group could see what they look like.

Jeff opened the discussion for Public Comment. There was none.

Jeff said that he will have additional information for the work group tomorrow. The work group will meet again at 8:15 on Wednesday, December 5, 2007. The meeting was adjourned.

December 5, 2007

Review Staff Research from Questions Raised at last meeting.

The workgroup resumed discussion on definitions. Jeff and Jill presented a revised definition on the white board that was based upon the discussions of the previous day. The workgroup worked on refining these definitions and identified questions related to other states experiences that they would like additional information. The questions include: Is there any data on whether licensed or unlicensed people are more often perpetrators to vulnerable persons? How do other states treat licensed and unlicensed persons? If licensed people are not included, is that because they get background checks elsewhere? The workgroup would like to hear from licensing boards on some of these issues. Jeff indicated he would include an action item to follow up on this and see if there is any information that can be obtained from the other state information or from the state licensing boards.

State Survey - Criminal Background Check

Discussion resumed on the definition and changes that the workgroup made on the white board definition. Jeff suggested that the workgroup take a break and the definition would be put on a computer and put on a projector and modified from there. The group agreed took a break during which time the definitions were put on the projector. After the break the workgroup refined the definitions until a consensus was reached.

The definitions on which the work group has consensus today are:

Direct care access employee means a person, 18 years of age and older, who has employment or contractual relationship with a service setting that is funded or regulated by the Department and involves direct contact with a vulnerable person. Such term does not include an individual that is employed or providing services through a private arrangement with a vulnerable person or their designated representative.

Vulnerable person means a person who receives services as defined in this act and who needs to be protected from abuse, neglect or exploitation.

Direct contact means physical access to persons receiving services or that person's personal property.

Service setting for the purposes of this act means those programs or services that the legislature has determined to represent the greatest risk to the health, safety, and welfare of vulnerable persons served by the department. Such definition include, as these services are defined in statute and Administrative Rule:

- Youth Care Facilities
- Community home for persons with severe disabilities - Group Homes for Developmentally Disabled or Physically Disabled
- Adult Day Care
- Adult Foster Care
- Assisted Living Facilities
- Critical Access Hospitals
- Home Health agency
- Hospice
- Hospitals (Including *inpatient psychiatric services*) Montana State Hospital
- Inpatient Chemical Dependency Centers
- Intermediate Care Facility for the Developmentally Disabled
- Mental Health Centers
- Nursing Facility (Nursing Homes) (LTC) (Veteran's Homes) (Montana Developmental Center) (Montana Mental Health Nursing Care Center) (Transitional Care Unit)
- Residential Treatment Center (RTC)
- HCBS
- Personal Care Services

Work may still be needed on these definitions. The workgroup may need to continue working on a private arrangement definition.

There was still debate on the volunteer issue. Jeff said that we may not get a consensus on this, and if that is the case, that will be explained in the report. There was consensus that many unlicensed staff, nurses and administrators should have background checks done. Jeff requested emails or letters from the workgroup members regarding their opinions and comments on volunteers. All agreed that this would be useful for those that wanted to comment.

Disqualifying events.

Jeff and Becky gave a brief explanation of the worksheet and handouts addressing the disqualifying events. The workgroup began reviewing and discussing definitions of certain offenses with help from DOJ legal counsel Ali Bovington. Instead of defining aged out offenses, it was suggested the workgroup look at offenses that can be appealed. The discussion suggested that process might be more palatable to the legislature. The work group did not complete the review of the worksheet as it was time for public comment. The workgroup agreed to continue the review of the disqualifying events at the next meeting. The worksheet used in the discussion is attached.

Public Comment.

Abby Hume, SLTC, expressed a concern about the self-directed care piece of the definition. Self directed care has some unique place in our state. Consumers are making choices, knowing up front that their caregiver may have a felony record. There is a co-employer relationship. Ms. Hume is also concerned about HCBS in the Administrative Rules and a general reference to the program in the definition. The process for changing the ARM is extensive. The work group is proposing a comprehensive list of all HCBS services and some of those services were identified in the October meeting as excluded from this process.

Jeff reviewed the timeline set up by the workgroup; he is hoping there will be two more meetings. He discussed the date of the next meeting, somewhere around the end of January, beginning of February. It was suggested there be longer meetings instead of more meetings.

Action Items:

1. Send email to workgroup with optional dates for January meeting.
Meeting date will be based upon best availability of members.
2. Department staff to visit with Senior and Long Term Care (SLTC) staff regarding HCBS Services and self directed personal care in relation to general inclusion in the definitions.
3. Workgroup members were requested to send Jeff letters or emails regarding suggestions and/or opinions on how to address the volunteer issue.
4. State staff to follow up with research and analysis on previously selected ten other states and identify options from previous meetings regarding:
 - i. Appeals Process

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- ii. Exclusions of other kinds of practitioners
- iii. Distinctions between licensed and unlicensed staff
- iv. Issues/problems of getting legislation passed in their state.

II. Adjourned.

SJ 7 Workgroup
Meeting Minutes
February 20-21 2008

February 20, 2008

Work group members present: Betty Beverly, Grace Bowman, Webb Brown, George Groesbeck, Mike Hanshew, Rose Hughes, Karolyn Redding, Bob Ross, Al Ward (Claudia Clifford), Jeff Buska, Jill Caldwell, Becky Fleming-Siebenaler.

Welcome & Brief Summary of Last Meeting.

Jeff Buska opened the meeting and briefly identified and discussed the agenda for the next two days, and the handouts that were provided to the work group (handouts and agenda attached). The handouts are: Summary of December work group consensus on definitions for discussion; Follow-up Phone Interviews for the Work Group's Identified Ten States; Ten State Summary of Data Collection Regarding Appeals Processes and Recommendations for Appeals Process in Montana; Disqualifying Events Summary (Draft #2); and Administrative and Process Discussion Items.

Jeff noted a draft of the December meeting minutes were sent out for comment to the workgroup, and without discussion they were accepted.

Review of State Survey Questions Follow-up

Jill briefly went through the handout on the follow up calls to the ten states. Answers vary widely through the ten states. Jill stated that it was hard to find historical knowledge when it came to getting information regarding a States' legislative experience with bills.

The inclusion of the volunteer's in the definition was addressed again. Jeff said there will probably be language in the report that there was debate regarding whether or not to include them as a category that needs background checks. It was noted that 6 out of the 10 states require checks on volunteers. Ali Bovington at DOJ was going to look at establishing a low cost process to check volunteers. Jeff will follow up with her. There were also questions of volunteers under the age of 18. David Blade from DOJ said there was not much information DOJ would release on individuals under the age of 18.

The question was asked if we are just looking at the fingerprint check, or are we still considering the name based? Jeff said the language in the resolution talks about fingerprint checks, but the work group is still discussing that. David Blade from DOJ pointed out that a study done on name based checks showed 14% of people misrepresenting their names. There is also an increasing problem of identity theft. There is a concern of cost of fingerprint checks.

It was discussed what the report for the legislature might include. Jeff said a draft report will try to be drawn up for the next work group session for comments. The timeline is critical. Want to get it out for comment soon. The definitions the workgroup worked on during the previous meeting were discussed. It was suggested that the report include

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some narrative regarding the definitions to provide examples and elaborate more on who is affected by this definition. The workgroup did not include job titles in the definitions because they vary from provider to provider and service settings. The report needs to provide narrative that the intent was to include all staff that have access to a vulnerable individual, including but not limited to the Administrator, nursing staff, aides, housekeeping, dietary, maintenance, and administrative staff.

Rose Hughes indicated that she has received some email from association members and indicated that some facilities are nervous about the background requirement. She indicated that many facilities now use a private service to conduct background checks. There is a concern that they don't want something more expensive or more of a burden on providers. A discussion followed regarding private services for background checks and a possible problem that these private services have no regulation. A question was raised about creating a list of credible private services? Jeff indicated that the Department would try to get some information for the next meeting.

Discussion regarding the proposed Direct Care Access Employee Definition related to HCBS Waivers and Self Directed Programs. Work group discussed and debated the proposed changes for self direct services and HCSB waivers. Mike Hanshew explained there are two different kinds. One is purely self directed, where the consumer has an EIN. The second is a co-employment arrangement with an agency and the agency has the EIN number, but the consumer makes the staffing decisions. Mike thought all should be subject to background checks. Kelly Williams from SLTC was concerned that this may infringe on the right of consumer choice. Some members of the work group pointed out that it is still state money. It was agreed there still needed to be some discussion of these services.

Jeff proposed including the Child Care programs in the service settings. During the department research on an appeals process and the disqualifying events he thought it would be appropriate to include them in the service setting definitions. There was the discussion of adding Child Care back in. It was the consensus of the work group that that be done under separate legislation, even though the resolution says all services funded and regulated by the department. There are no child care advocates on the work group.

Discussion of Disqualifying Events – work of subcommittee

Subcommittee started working on list of disqualifiers. So far, 36 offenses are permanent disqualifiers, and 135 are other than permanent and/or aged out. The working definition of "other than permanent" is the employer has the option to hire the employee, knowing that the applicant/employee has a conviction on their record.

Discussed whether employers would prefer to make determinations on whether they can hire or not hire based on certain crimes or have the state give a yes or no hiring determination. There was also the discussion on whether PHHS (or whoever turns out to be the clearinghouse for the background checks) can inform the employer of

information on the record that is not disqualifying. Would have to work out with DOJ what information could be released to employers.

Several workgroup members asked for more input from either DOJ or PHHS attorneys on what offenses should be disqualifiers. Hard to make a determination based on language in statute, and work group does not feel qualified. The work group also wants clarification on how to balance offenses from other states. Jeff said it unlikely DOJ would want the clearinghouse role but will have that discussion with them.

There was still some concern about the timeliness of getting a background check done. The estimate is 3% of background checks return some sort of hit, and those will take longer to process and verify.

There was concern from some work group members that there be some criteria that the employer would have to base a decision on. They would prefer a clear yes or no from PHHS. Jeff was going to check with DOJ to see what information on a rap sheet can be released to third parties (the employer). The three options Jeff agreed to write up are:

1. PHHS tells the employer whether or not they can hire the individual based on disqualifying offenses.
2. PHHS tells the employer whether or not they can hire the individual based on disqualifying offenses and in addition will tell the employer if there is an offense that is not disqualifying, but may cause some concern.
3. PHHS gives the employer all of the information of any offenses.

The work group briefly discussed a Grandfathered provision. It was commented that turn over rate are somewhere around 25-30% and within some services in the state it is reported to be as high as an 80%. Therefore, it would take only a couple of years before most staff would have background checks done.

Public Comment.

Donna Davis made a suggestion that the workgroup make a list of the permanent disqualifying felony convictions. Appeal here is limited to the accuracy of the criminal record. Any other felony conviction is subject to review, any disqualification must have a rational relationship to the job applied for. The appeal here is broader; it's allowed when there is a challenge to the exercise of discretion by the entity that determines the disqualification.

David Blade clarified that the RAP sheet will show everything, from arrests to court decisions to deferred sentences and dismissals. Permanent disqualifiers and name based checks make him nervous.

February 21, 2008

Discussion – Disqualifying Events and Appeals Process.

Jeff is going to get with DOJ and PHHS legal staff and identify what they want as permanent disqualifiers. Everything not on that list Jeff will bring back to the work group to decide what to do with. They will also look at other statutes to make sure offenses

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such as elder abuse and financial crimes are listed. Montana will need to create some method to benchmark Montana's list of crimes against other states. There was some discussion but not consensus on whether to have the disqualifier list in statute or rules.

There was debate about name based vs. fingerprint check. There were concerns about the cost and time involved with the fingerprint checks. And there was concern about not getting enough or correct information with the name based checks.

Four different options were provided to the work group based upon the discussion. It is apparent from the discussion that the group is divided on the appropriate method for background checks, with some favoring only a finger print process and others a less intrusive and costly process of name based checks, or some combination thereof. The options the work group identified and discussed are:

1. Full fingerprint check on designated service providers. FBI and WIN states.
2. Require a background check and state prescribes a process. Name based for Montana residents. If from a WIN state, must also do a WIN check. If from a state other than WIN, must do a FBI check.
3. Requirement for a check. Employer has Policies & Procedures to determine their process. DPHHS will explain possibilities, but employer decides how they do check; name based, private company, WIN state check for FBI check. Have minimum criteria. Expectations are that references are not enough. If from another state, Montana check alone is not enough.
4. Self disclosure (what we have now)

Options 1 and 2 have more protections for the facility. All of these options will still have a list of permanent disqualifiers. Department staff will work on a list of Pros and Cons for each option to be discussed at the next meeting.

Jeff discussed the administrative process outline that was prepared for the fingerprint checks. The timelines and grandfather provisions were identified as well as a registry. There was discussion about DPHHS setting up a registry system to see if a background check had been done on a potential employee. It would put an administrative burden on the department to create and maintain a registry but it would be useful for providers to help keep costs down. The department would not want the registry available to the public and would need to figure out a way to control access to the registry. Options one and two have the capability for a registry. The registry may speed up the hiring process.

There was still some concern about the turnover rate of certain staff, and getting background checks done every time they move. Jeff said the department wants to minimize the footprint on providers, have cost be minimal, and be efficient.

The workgroup did not reach consensus on funding. Jeff will bring some funding ideas to the next meeting.

Discussion – Appeals Process

There is already an appeals process through DOJ to appeal what is on a record. The workgroup needs to focus on the process for other appeals. The group agreed there had to be a process for appeal. There was debate on whether people could appeal on everything, or just things that are not considered permanent disqualifiers. There was also concern on how long the appeals process would take, employers may not wait a few months for the appeal to be decided.

The question was asked how many people appeal in other states. This information is not known. Becky, who handles the appeals for Child Care Licensing, says that due to a change in Rules she has more appeals now than ever. She has had around 25 in the last year, and of those, 4-5 went onto a hearing.

Department staff or an appointed commission could handle the appeals. There was some discussion that an appeals process could be handled entirely by DOJ. Jeff indicated that DOJ would handle the appeals for the content of the background checks but that DPHHS would need to handle the other appeals. DPHHS's initial proposal is to not have an agency appeals process similar to some other states as indicated in the handouts. The work group discussed this option and felt that the department needs to have some type of appeals process. Jeff indicated that he would have that discussion with the legal staff and the office of fair hearing and would come back with proposals for the group.

The work group also felt that this process needs to include some legal protections for both the state and the facilities from lawsuits if a waiver was granted and something happened to vulnerable individual.

The group discussed questions about the enforcement of statute that required background checks. How will we make sure facilities are doing background checks? Jeff indicated that it would likely be included in the survey process for healthcare facilities.

Public Comment.

James Driggers, SLTC. Thinks an appeal process is important. Anticipate people in self directed care to appeal more often, sometimes they do not have a lot of options. Encourages work group to endorse an appeal process.

Katie Spaid said as an employer, they would be too nervous to let someone work for the 30-90 days an appeal was being heard. It is too long to have somebody in the home providing care.

Jeff introduced Joe Wodnik and Dave Blade from DOJ. The group discussed the DOJ checks and processes. Joe said he would get the necessary information and get the answers back to the workgroup. There may be an audit process by the feds of the employers on how they handle the information they release.

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Jeff said that if the work group cannot get consensus on the type of background checks process, the department will still go through with some sort of legislation. This however, still needs to be discussed with the Director and the Governor's Office.

There was a question on whether we are charged with creating a bill or making a recommendation to the committee. Jeff said we are putting together a report for the Director and the Governor and will make the determination on how to best proceed with legislation. The report will have draft legislation included.

Jeff has had a brief discussion with Sue O'Connell about drafting. It was recommended we get comments from ACLU. Other legislators expressing interest are Carol Williams and Judy Schmidt.

Public Comment.

None.

Jeff will come back for process, timelines, and pros and cons regarding the options discussed.

The next meeting was supposed to be March 26-27. That is spring break week, and Jeff was hoping to meet on another date. Several work group members agreed to another date as they also did not realize this was spring break week. The department will send out different options to the workgroup for another date.

Jeff, Jill or Becky will communicate with DLI on asking them about requiring background checks as part of licensing requirements.

Meeting was adjourned!

SJ 7 Workgroup
Meeting Minutes
April 9-10 2008

April 9

Workgroup members present: Betty Beverly, Gayla Brown, Webb Brown, Tom Gregg, George Groesebeck, Mike Hanshew, Rose Hughes, Shirley Powell, Karolyne Redding, Al Ward (Claudia Clifford), Jeff Buska, Jill Caldwell, Becky Fleming-Siebenaler.

Welcome and brief summary of last meeting

Reviewed and approved the minutes from the February 20-21, 2008 meeting.

Handouts provided to the workgroup include: Agenda; SEIU Initiative; Consensus on definitions; DOJ SJ 7 Work Group questions regarding background checks; Memo regarding Dissemination Limits of Criminal History Information; Disqualifying Event Summary (Draft 3); 10 State Summary Regarding Appeals Process; Recommendation for Appeals Process in Montana; Options for Background Checks; and Administrative and Process Discussion Items.

Jeff worked with agency legal staff and received some comments. The attorneys had some small changes to the definitions since the last meeting and some were incorporated into the definitions document. No substantive changes were made to the definitions that were discussed in previous meetings.

Before going through agenda, Jeff talked about the SEIU initiative, and handed out latest version. This is the one that went to AG and SOS office. There is broad language regarding background checks and Jeff wanted the work group to know this is out there and that it relates to the work we have been doing regarding background checks.

Jeff contacted staff at Department of Labor and Industry (DLI) and asked for help identifying a count of employees, based upon our service setting list that could be affected by looking at unemployment insurance information. The report we received from DLI identified approximately 42,000 people were employed in these setting last year. This appears reasonable and will be the base number of employees we will use for cost analysis. The Department will use this figure plus an estimate of the home based care employees from SLTC and DSD to identify a total estimate of the employees that would be subject to a background check. This total may be approximately 50,000 employees.

Jeff had a brief discussion about background check companies and the information they offer. Not much information is available, but we were able to identify a few companies providing this service as noted in the handout. Jeff also discussed the agency survey we are conducting on Survey Monkey and discussed the preliminary results with the

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workgroup. After the close date of the survey, we will be compiling this information for the work group.

DPHHS does have a placeholder in the agency requests for legislation related to background checks. Department is having discussions with the governor's office and is trying to decide whether this will come from agency legislation or a committee bill. Jeff will be working on the report that will satisfy the requirements of SJ 7, all on the work group may not agree with it. Jeff would like to have a draft for the workgroup to review and comment on in June.

DOJ Information regarding fingerprints and availability of results (Joe Wodnik and David Blade)

Refer to handouts provided by DOJ. The first document is the one titled SJ7 WG Questions regarding background checks and the second document is the one dated 4/7/2008 from Stuart Segrest to Ali Bovington regarding Dissemination Limits of Criminal History Information. David Blade provided an overview of the documents and the workgroup discussed the documents regarding fingerprint cost, timelines to process checks, and quality. David clarified that the whole RAP sheet can be released with a consent form. He passed out a sample RAP sheet.

Jeff clarified that if DPHHS is the clearinghouse, employers will be given this information with a thumbs up or thumbs down regarding hits against the disqualifying criteria, as opposed to getting the whole RAP sheet. The workgroup was reminded that the agency proposal on the table is to grandfather in current employees and require background checks on new employees after a certain date. With the high turnover rate in the industry, we estimate it should take 3-5 years before almost everybody is checked.

It was asked if DOJ may take longer than the 5-10 days with an influx of requests. Dave thought that the potential problem with this timeline would be related to the error rate regarding the quality of the fingerprints. Also, with the grandfathering in of existing employees, there will not be an explosive demand. The workgroup discussed again the importance of the timeliness of the process to complete the processing of the fingerprint checks via DOJ and the FBI. Long delays in the administrative process with DOJ and DPHHS area concern of providers and will impact the success of a fingerprint requirement.

Discussion disqualifying events

At the request of the workgroup from the February 2008 meeting the department formed a subcommittee including staff from QAD, APS, and DOJ as well as DPHHS legal staff to identify and define a list of disqualifying crimes. They focused on 3 areas: what is a permanent disqualifier; what can be aged out; and what do we not want to consider. Through a comprehensive discussion this group identified 48 permanent disqualifiers and 41 aged out offenses. These are identified in the handout titled Disqualifying Events Summary (Draft #3). The workgroup discussed and agreed that permanent disqualifiers should be in statute, the aged out offenses in rules. DPHHS would need

authority in the statute for rule making authority in this area. The committee knows that comparisons between same crime and different wording between states will be a complicating factor that needs to be addressed by DOJ and DPHHS. The work group agreed with the permanent and aged out offenses as proposed in the document.

Public comment

None.

Discussion Appeals Process

Jeff identified two handouts for the workgroup related to this agenda item. One handout is titled Appeals Process Recommendation for Appeals Process In Montana, April 2008 and the other is 10 State Summary of Data Collection Regarding Appeals Process, March 2008. Jeff indicated the state is looking at two separate appeals processes; one to determine the accuracy of the results of the criminal information, and one to see if an employee warrants the public trust. The cost of a record appeal through DOJ is \$10, but they have some discretion to waive that fee. If DOJ has to go to the FBI, there is no fee waiver.

Becky explained the handouts; obtaining information from the other states was hard to get regarding numbers of appeals. The department proposes an appeals process similar to NM with a non-adversarial administrative review. If after notification of the results of the administrative review and the individual disagrees with the determination they can request a Fair Hearing through QAD. It was noted that it needs to be clear that approvals by this process do not guarantee hiring by an employer. Ali Bovington had some concerns with the appeals process and the state taking on liability. The workgroup discussed the proposed process and generally agreed that an appeals process is necessary and the department should be provided the authority for developing administrative rules to refine the process.

Public comment

None.

Meeting adjourned!

April 10

Review of Options for Background check process

The SJ 7 resolution calls for a study of fingerprint based background checks, but based upon the discussion at the February meeting the workgroup identified a couple of other options that should be addressed in the report. Based upon the options identified and briefly discussed in the February meeting, department staff and DOJ staff reviewed those options to identify the pros and cons of each option. Jeff referred the workgroup to the handouts SJ 7 Options for Background Checks and page 4 of the DOJ document. All options have the same list of disqualifying events and appeal process.

Option 1 covers a full fingerprint background check requirement, Option 2 covers a requirement for background checks and the State prescribes the process of a

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progressive check, and Option 3 covers a general requirement for some type of criminal background check.

Jeff reviewed the handout with the workgroup and opened discussion for comments changes or suggestions.

Option 1: Full Fingerprint Background Check. David Blade informed the workgroup that Washington is a new WIN state. The process may be easier if we only used WIN checks when appropriate. This may reduce the cost. It is a good resource, and cheaper. Discussion identified that use of the WIN does require some risk analysis by the provider to determine the prior work history and residence of the employee.

Option 2: Criminal background checks required and the State prescribes a process of a progressive check. The employer makes the decision that the fingerprint check needs to be done after the name based check. Name based checks have weaknesses previously discussed, name changes, exact spelling, and accurate information. The registry would be limited and would result in only including those employees who had the fingerprint check done. It could result in a registry that would be more of a do not hire list, than as a resource to employers. Al Ward identified that 14% of employees provide false info regarding their names which makes a name based system subject to false responses.

Option 3: Some type of background check required. Employer has policies and procedures to determine their process. Some work group members thought this option does not meet requirements of the resolution but still feel like we need to give the options as part of the report. It is more than we have now.

Discussion regarding the Pros and Cons handout resulted in the following suggestions and changes:

PRO:

(all options) This legislation may have a sentinel effect to job applicants.

(all options) Ensure confidence from the public that we are protecting the vulnerable population, another mechanism, not a guarantee

(Option 1 and 2) A protection for employers as well (lawsuits& liability).

(Option 3) Provider driven.

(Option 1 and 2) Registry will eventually make most checks cheap and fast.

CON:

(all options) There is a DPHHS administrative cost.

(Option 3) All information is public, arrests are public information.

(Option 2 & 3) there is a concern of fingerprint security, may be considered invasive.

(Option 1) has a significant increase in workload to DPHHS.

(Option 2) Decision making complicates it for facilities.

(Option 2) Worry that there are Montana resident that commit crimes in other states.

(Option 2 & 3) An employer cannot get a national check unless fingerprints are utilized.
(Option 2 & 3) Does not meet requirements of resolution.
(Option 3) has just a bad actor registry.
(all options) The cost, hassle, and timing of doing a fingerprint background check.

Several members of the workgroup brought up the question of how this is going to be paid for and by whom. Jeff indicated that he understands that the workgroup feels this is something DPHHS should be paying for, at least all or in part. He will look into seeing if Medicaid matching funds can be provided or claimed for administrative functions or as a benefit. There was general concern from the workgroup about having employees pay the cost of the background checks. Many felt this was a cost employees, especially those on the lower end of the pay scale cannot afford to pay, and may result in additional burden on the workforce issues.

Process and Administrative Activities for a system of Background checks progress/methodology for estimating costs.

Jeff identified the handouts for this discussion. There are three pages, one for each option, entitled Administrative and Process Discussion Items. Jeff outlined the documents and the workgroup discussed the handouts.

There was concern from the workgroup about an employee applying at more than one location and which employer would be responsible for getting the background check completed. It is a good question as an individual may be applying for a job at more than one employer at a time. This was discussed and determined that it needed to be tracked and handled administratively by DPHHS and DOJ. This is where the registry would come in handy to identify a background check is already in process by another prospective employer.

It was suggested to keep the outline for Option 1 but consider changing Option 2 and 3 to only identify items that would change. Indicate at the beginning of Option 2 and 3 that the administrative and process items are the generally same except for the following items. Jeff indicated the documents would be changed to reflect this suggestion.

The workgroup generally agreed to the proposed timelines for implementation for each option and the concept of grandfathering in existing employees as of a certain date. Most of the ensuing discussion revolved around the RAP sheet and disposition of the fingerprint card. It was suggested that DPHHS would hold onto the RAP sheet until the appeal process timeline was over, and then destroy it. Looking into whether DPHHS or DOJ should destroy the fingerprint card. It is procedural, but important for legislature to know that fingerprint cards are destroyed. DPHHS only involved in the process after fingerprint is completed so fingerprint cards and issues regarding rejected cards would be dealt with between DOJ and employer.

Public comment

None.

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Process and Administrative Activities for a system of Background checks progress/methodology for estimating costs. (Continued).

The workgroup continued discussion of the handouts. Some action items and details will be to talked about but this outline everyone felt was useful to get a feeling for the administrative requirements. Regarding the cost of the background check, it was suggested that if state is paying for it, the department should provide a thumbs up or thumbs down related to the disqualifying events. If employer pays for the cost of the background check then they should get a RAP sheet with a copy to DPHHS for purposes of the registry. All agreed that some type of notification to employer is needed, either electronic or paper, but most in workgroup liked an electronic option.

Length of time that the fingerprint background checks are good for was discussed. Several members thought that 5 years was too long but perhaps 3 years was more reasonable. The discussion included the possibility of another fingerprint check after 3 years. Jeff indicated that he thought about this and it is possible that something may be able to be done internally to update the background check by utilizing the department's access to Criminal Justice Information Network (CJIN). The department may be able to update the background check information is an individual is still employed in Montana and has not been absent for a specified period of time. If a person was residing in another state and returns to Montana a new fingerprint background check would be required. The discussion included methods to keep the information on the registry valid and current. It was suggested that the State may need to find a way to get individuals off the registry if they are inactive for a certain amount of years. One suggestion is to ask employers for their active employee roster every year or require employers to validate the employment on the registry somehow each year. These are details of the registry that the department would need to consider and perhaps continued involvement by the provider community and associations would be useful if some type of legislation was passed.

All agreed that there needs to be a training and education requirement for facilities and DPHHS staff under all three options and that the employer should have the ability to decide to hire the employee or not during the time it takes to complete the background check.

Regarding Option 3, although it may be the easiest to implement it does not seem necessary to have a registry with this option. Several members thought the cost may not be worth it for the benefit a registry may provide. Essentially the registry would primarily be a bad person list and require the reporting by employers and an administrative process to add someone to the list. A more formal correspondence with employee regarding appeal process would be needed.

Summary and Review

Jeff identified a few items that still needed to be addressed and one is a cost analysis. The workgroup made it clear that they don't want to have applicants pay for the cost of the background checks, and to the extent possible the department needs to try and

minimize the financial impact on employers. Jeff recognized this message and will try to address it in the report. Several work group members thought the money for the background checks need to be in the DPHHS budget. Jeff could not commit that it would be in the DPHHS budget request.

The other item on the "to do list" is to prepare the report for the legislature and provide an opportunity for the workgroup's review before finalizing the report. Jeff mention that the next meeting of the Children's Families Health and Human Services Committee is sometime in June and the report probably will not be done by then. Jeff would like to have one more meeting to discuss the report and go over the cost analysis. This meeting was suggested to be in June sometime. All agreed that they would like to have this opportunity.

The work group went around the table with the remaining members regarding their preference on the options we discussed in light of all the information that has been provided, and everything they have learned over the last several meetings. In summary, all of the workgroup members indicated they though a fingerprint background check process was the best option. Several quantified that response by indicating it depended on the cost, who pays, and how fast the background check can be completed.

Things that need to be considered:

- ✓ Some sort of phase in process, either by service setting type or geographical region.
- ✓ Enforcement of law.

Action items:

- ♦ Write the report. QAD will work with the Director and Governor. Will want one more meeting, in mid to late June.
- ♦ Look for funding and cost out each option.
- ♦ Work on appeal process and administrative documents.
- ♦ Break out the estimated number of people affected by DLI by service setting.

Public Comment

James Driggers, SLTC. He is just interested in process. Compliment the group. Division needs a round of applause.

Seeing no further public comment Jeff adjourned the meeting.